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Name of Court.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA.

Style of Cause.

Civil Action File No. 1539.

MARTHA BARNES,

Plaintiff,

versus

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, doing business as THE JEFFERSON MUTUALS,

Defendants.

Removal from Circuit Court of Marengo County, Alabama. Suit For Judgment in the sum of $4,545.09 Claimed Under Fire Insurance Policy.

PETITION FOR REMOVAL.

(Title Omitted.)

The undersigned petitioners, Lititz Mutual Insurance Company, a corporation, and Implement Dealers Mutual Fire Insurance Company, a corporation, re-

spectfully shows that on Sept. 10, 1955, suit was filed against them by Martha Barnes in the Circuit Court of Marengo County, Alabama, a correct copy of all process, pleadings and orders served upon it in such action being attached hereto; that service of process was had on these petitioners on September 13, 1955; that the cause of action stated in plaintiff's complaint is upon a policy of fire insurance issued by the petitioners wherein the plaintiff has demanded damages against the petitioners in the sum of $4,545.09.

Petitioner shows that the amount in controversy in said cause of action exceeds the sum of $3,000.00, exclusive of interest and costs, as in the plaintiff's complaint is alleged.

Petitioner further shows that the plaintiff, Martha Barnes at the time of the beginning of said action and ever since has been and still is a citizen of the State of Alabama; that the petitioner, the defendant Lititz Mutual Insurance Company, at he beginning of said action and ever since has been and still is a corporation organized and existing under & by virtue of the laws of the State of Pennsylvania and is a citizen of said State; that the petitioner, the defendant Implement Dealers Mutual Fire Insurance Company, in this cause, at the beginning of said action and ever since has been and still is a corporation organized and existing under and by virtue of the laws of the State of North Dakota and is a citizen of said state; that the controversy in said cause of action is entirely between citizens of different states; that the petitioners desire to remove said cause from said state Court to the United States District Court

for the Northern Division of the Southern District of Alabama.

Petitioner files herewith and presents to this Court its bond in the penal sum of $500, with United States Fidelity & Guaranty Company, a corporation, as surety thereon, and prays that the same be accepted and approved by this Court.

Petitioner prays that the filing of this petition and said bond and the giving of written notice hereof to the plaintiff, and the filing of a copy of this petition with the Clerk of the Circuit Court of Marengo County, Alabama, shall effect the removal of said cause to the Court.

LITITZ MUTUAL INSURANCE COMPANY; and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY,

By J. S. MEAD,
(J. S. Mead),
Their Attorney at Law.

State of Alabama,
Jefferson County.

J. S. Meal having duly sworn, says that the matters set forth in the foregoing petition are true.

J. S. MEAD,
(J. S. Mead).

Sworn to and subscribed before me this 28 day of September, 1955.

HAZEL HITCHCOCK,
Notary Public.

(Notarial Seal)

I hereby certify that I have served a copy of the above petition and a copy of the bond referred to therein, on Lloyd & Dinning, attorneys of record for plaintiff, Demopolis, Alabama, by mailing them a copy thereof this 28th day of September, 1955, and also that a copy of the above petition has been filed with the C'erk of the Circuit Court of Marengo County Alabama, this date, by mailing him a copy.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendant.

JOSEPH S. MEAD,
734 Frank Nelson Bldg.,
Birmingham, Alabama.

Filed Sep. 29, 1955.

Summons.

State of Alabama,
Marengo County.

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Lititz Mutual Insurance Company, Lititz, Pennsylvania; Implement Dealers Mutual Fire Insurance Company, Grand Forks, North Dakota; and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company, doing business as The Jefferson Mutuals, to appear before the Circuit Court of Marengo County, Alabama, at the place of holding the same, to plead, answer or demur, within thirty days from the service hereof, to the complaint of Martha Barnes.

Witness my hand this 10th day of Sept., 1955.
(S.) C. E. RENTZ,
Clerk.

In the Circuit Court of Marengo County, Alabama,
At Law.

Martha Barnes, Plaintiff,
vs. Case No. 4010.
Lititz Mutual Insurance Company; Implement Dealers Mutual Fire Insurance Company; and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company, doing business as The Jefferson Mutuals, Defendants.

Count One.

The plaintiff claims of the defendants Four Thousand Five Hundred Forty-five and 09/100 dollars ($4,545.09), the value of the damaged portion of a commercial building which the defendants, on, to-wit, the 3rd day of October, 1949, insured against loss or injury by fire and other perils in the policy of insurance mentioned, for the term of five years, which commercial building was damaged by fire in the amount aforesaid on the, to-wit, 22nd day of September, 1953, of which the defendants have had notice.

Count Two.

The plaintiff claims of the defendants Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09), for this, that on, to-wit, the 3rd day of October, 1949, the defendants issued a fire insurance policy, to-wit, No. OC 41662, in the sum of Five Thou-

sand Dollars, insuring the one story frame commercial building located at, to-wit, 221 North Washington Street, Demopolis, Marengo County, Alabama, and being situated on parts of lots 589 and 590 in said City of Demopolis, against loss by fire; that George H. Jay was named as insured in said policy; that there was attached to and made a part of said policy a Standard Mortgage clause, a copy of which is attached hereto as "Exhibit A", and specifically made a part hereof, and that by Loss Payable clause dated, to-wit, November 8, 1949, loss was made payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject to all conditions of the policy, a copy of said Loss Payable Clause being attached hereto as "Exhibit B" and specifically made a part hereof; that the mortgage of George H. Jay and wife, Marjorie A. Jay, to H. A. Feibelman, dated, to-wit, October 22, 1949, covering said real property, and recorded in the Probate Office of Marengo County, Alabama, in Book 334 of Mortgages, at page 469, was transferred, together with the indebtedness thereunder secured, from Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as Co-Executors of the last Will and Testament of Harry A. Feibelman, deceased, to Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as Co-Trustees of the last Will and Testament of Harry A. Feibelman, deceased, by transfer recorded in Releases and Powers of Attorney Book 7, page 292, said Probate Office, and transferred to Plaintiff by transfer dated, to-wit, the 18th day of April, 1955, and recorded in Releases and Powers of Attorney Book 8, at page 51, of said Probate Office; [that said insurance policy and all rights therein were transferred

by Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as Co-Trustees under the last Will and Testament of Harry A. Feibelman, deceased, to plaintiff by transfer dated, to-wit, the 10th day of May, 1955, and recorded in said Probate Office;] that the building described in the said policy and covered by said mortgage, and covered by said policy and said mortgage clause, was damaged and partially destroyed by fire on, to-wit, the 22nd day of September, 1953, of which defendants have had notice, and at the time of the fire and some time prior thereto said H. A. Feibelman held the aforesaid first mortgage covering said insured building, at which time there was due on said mortgage a sum, to-wit, in excess of said sum of Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09); [and that at the time said mortgage and at the time said insurance policy were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09), which debt is still unpaid;] that on the date of aforesaid fire, said insurance policy and mortgage clause were in full force and effect; that defendants have failed and refused to pay anything on said loss, or under said policy. And plaintiff further avers that she is now the owner of said mortgage and the indebtedness secured thereunder and of said insurance policy. And plaintiff further avers that the damage done to said building on said, to-wit, 22nd day of September, 1953, by the aforesaid fire was in excess of, to-wit, $5,000.00.

Count Three.

The plaintiff claims of the defendants Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09) for this, that on, to-wit, the 3rd day of October, 1949, the defendants issued a fire insurance policy, to-wit, No. OC 41662, in the sum of Five Thousand Dollars, insuring the commercial building located at, to-wit, 221 North Washington Street, Demopolis, Marengo County, Alabama, against loss by fire; that said policy had attached thereto and made a part thereof a Standard Mortgage clause, and that by Loss Payable clause dated November 8, 1949, loss was made payable to H. A. Feibelman, as his interest may appear, subject to all conditions of the policy; [that the insured named in said policy, George H. Jay, and wife had executed on, to-wit, October 22, 1949, a mortgage covering said real property to said H. A. Feibelman, which said mortgage, together with indebtedness secured thereunder, and which said policy have been transferred for value to plaintiff and that plaintiff is the present owner of said mortgage and the indebtedness secured thereunder and of said policy;] that the building described in said policy and covered by said mortgage, and covered by said policy and said mortgage clause, was damaged and partially destroyed by fire on, to-wit, the 22nd day of September, 1953, of which defendants have had notice, and at the time of the fire and some time prior thereto said H. A. Feibelman held the aforesaid first mortgage covering said insured building, at which time there was due on said mortgage a sum, to-wit, in excess of said sum of Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09); [and that at the time said mort-

gage and at the time said insurance policy were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09), which debt is still unpaid;] that on the date of aforesaid fire, said insurance policy and mortgage clause were in full force and effect; that defendants have failed and refused to pay anything on said loss, or under said policy, and said building on said, to-wit, September 22, 1953, was damaged in excess of, to-wit, $5,000.00, by said fire.

LLOYD & DINNING,
By W. W. DINNING,
Attorneys for Plaintiff.

Plaintiff Demands a Trial of Said Cause By Jury

LLOYD & DINNING,
By W. W. DINNING,
Attorneys for Plaintiff.

Filed Sep. 29, 1955.

EXHIBIT A.

Mortgagee Clause, forming a part of Jefferson Mutuals Policy No. 41662.

Mortgagee Clause (This entire clause is void unless name of Mortgagee or trustee is inserted on reverse side in space provided)—Loss, if any on building items under this policy, shall be payable to the mortgagee (or trustee) as provided herein as interest may appear, and this insurance, as to the interest of

the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, That in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.

This company reserves the right to cancel at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subro-

gated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.

The above Mortgagee Clause Does Not apply to personal property.

EXHIBIT B.

Loss Payable.

It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy.

Attached to and forming part of Policy No. 41662 of the (name of insurance company) Jefferson Mutuals issued at its (city or town) Newbern, (state) Alabama Agency.

Dated November 8, 1949.

(Signed) TURPIN VISE,
(Turpin Vise),
Agent.

Filed Sep. 29, 1955.

NOTICE OF REMOVAL.

(Title Omitted.)

To:

Lloyd & Dinning,
Attorneys at Law
Demopolis, Alabama

You are hereby notified that Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company, have caused to be filed on this 29th day of September, 1955, in the District Court of the United States for the Northern Division of the Southern District of Alabama, its petition, a copy of which is attached hereto, together with a copy of the bond referred to therein, for the removal of this cause from the Circuit Court of the Marengo County Alabama, to the District Court of the United States for the Northern Division of the Southern District of Alabama.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendant.

I hereby certify that I have served a copy of the within Notice, together with a copy of the Petition for Removal and Removal Bond on Lloyd & Dinning, Attorneys of record for plaintiff, this 28 day of September, 1955.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendant.

Filed Sep. 29, 1955.

REMOVAL BOND.

(Title Omitted.)

Know All Men By These Presents, That we, Lititz Mutual Insurance Company, a corporation, and Implement Dealers Mutual Fire Insurance Company, a corporation, as principals, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto Martha Barnes in the sum of $500.00 to be paid to the said Martha Barnes, her successors, heirs and assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed wih our seals this 28 day of September, 1955.

Whereas, the said Lititz Mutual Insurance Company, a corp., and Implement Dealers Mutual Fire Insurance Company, a corporation, have petitioned this Court for the removal of the cause pending in the Circuit Court of Marengo County, Alabama, wherein Martha Barnes is plaintiff and Lititz Mutual Insurance Company, a corp., and Implement Dealers Mutual Fire Insurance Company, a corporation, are defendants, to this Court,

Now, Therefore, The condition of this obligation is such that if the said Lititz Mutual Insurance Company, and Implement Dealers Mutual Fire Insurance Company, a corporation, shall pay all costs that may be incurred by reason of such removal proceedings should it be determined that said cause was not removable or was improperly removed, then this

obligation shall be null and void, otherwise it shall remain in full force and effect.

LITITZ MUTUAL INSURANCE COMPANY, a corp. & IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY a corp.,
By J. S. MEAD,
(J. S. Mead),
Its Attorney at Law,
(Principal).
UNITED STATES FIDELITY & GUARANTY COMPANY,
CHARLES T. SIMMONS,
(Charles T. Simmons),
(Seal) Its Attorney-in-Fact,
(Surety).

Approved:

DANIEL H. THOMAS,
(Daniel H. Thomas),
United States District Judge.

Filed Sep. 29, 1955.

ANSWER.

(Title Omitted.)

Now come the defendants in the above cause and for answer to the complaint say:

First Defense.

The complaint fails to state a claim upon which relief can be granted.

Second Defense.

(a) The defendants Lititz Mutual Insurance Company, a corporation, and Implement Dealers Mutual Fire Insurance Company, a corporation, did on to-wit, the 3rd day of October, 1949 issue a policy of fire insurance No. OC 41662 to George H. Jay covering on property described as 221 East Washington Street, N/S, Demopolis, Alabama, being a one story frame approved roof building occupied as an ice cream parlor, in the sum of $5,000.00. Defendants are without sufficient knowledge to either admit or deny that said building was located on parts of Lots 589,590 in the City of Demopolis. Defendants further admit that attached to said policy was a New York Standard loss payee clause in favor of D. F. Jacobs, Demopolis, Alabama, and that thereafter on to-wit, November 8, 1949, the said policy was indorsed by the defendants to add thereto the following stipulation: "It is stipulated that any loss that may be ascertained and proven to be due the insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, neverthe-

less, to all conditions of the policy." Other than as above stated, defendants deny that the mortgage clause attached to the complaint marked Exhibit "A" (which such clause is printed on the form) applies to H. A. Feibelman, it appearing from the foregoing that the loss payable clause applicable to the said H. A. Feibelman was a simple loss payable clause.

(b) Defendant is without sufficient knowledge to either admit or deny the facts stated in the second count of the complaint with reference to the mortgage described in said count, the record of same or the transfer thereof to the persons named, or any other matters set forth in said count not specifically admitted.

(c) Defendant admits that on September 22, 1953, the subject of insurance described in said policy was destroyed or damaged by fire and that the defendants have notice thereof.

(d) Defendants are without sufficient knowledge to either admit or deny the allegations of said count with respect to the amounts due on said mortgage or as to the amount of the loss sustained to said building.

(e) Defendants are without sufficient knowledge to either admit or deny that the plaintiff herein is the owner of said mortgage indebtedness or of the said insurance policy.

(f) Defendants have not had an opportunity to investigate all of the facts and circumstances of the matters averred in the complaint and will not be able

to fully answer the allegations thereof until they have had an opportunity to make such investigation by use of the discovery processes of this Honorable Court. At such time as they have apprized themselves of all the pertinent facts and circumstances they will amend this answer fully setting forth any additional defenses available to them as may exist.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

J. S. MEAD
734 Frank Nelson Bldg.,
Birmingham, Alabama.

I hereby certify that I have on this 3rd day of October, 1955, served a copy of the foregoing answer upon Messrs. Lloyd & Dinning, Attorneys of Record for the Plaintiff, by mailing the same to their offices, postage prepaid, at Demopolis, Alabama.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

Filed Oct. 4, 1955.

FURTHER ANSWER OF DEFENDANTS THIRD DEFENSE.

(Title Omitted.)

(a) Further answering the complaint, the defendants show that on to-wit, October 22, 1949, George H. Jay and his wife, Marjorie A. Jay executed a mort-

gage deed to H. A. Feibelman conveying the following described real estate:

"Beginning at the NW corner of the intersection of Cedar and Washington Streets, in City of Demopolis, Alabama, said point being the SE corner of Lot No. 590, as the same appears and is laid down and described on the map or plat of the said City of Demopolis, thence West along the north boundary of Washington Street for a distance of 62 feet and 6 inches, thence North a distance of 80 feet, more or less, thence East a distance of 62 feet and 6 inches to the West margin of Cedar Street, thence South along the West margin of Cedar Street to the place of beginning. Being a lot fronting on Washington Street 62 feet and 6 inches and running back North of uniform width a distance of 80 feet, and being a part of Lots No. 590 and 589, as the same appear and are laid down and described on the map or plat of the said City of Demopolis, and bounded on the South by Washington Street, on the East by Cedar Street, and on the North by an alley-way and a part of the picture show building owned by Henry W. Webb, and on the West by the property of Henry W. Webb."

Said conveyance was to secure the payment of the sum of Seven Thousand ($7,000.00) Dollars, evidenced by a promissory note made payable on to-wit, October 24, 1951, and executed by the said George H. Jay and Marjorie A. Jay to the said Feibelman, which said note provided for interest at the rate of six per cent (6%) per annum, payable annually on October 24, 1950, and October 24, 1951, and which said mortgage deed was filed for record on October 28, 1949, in the Office of the Judge of Probate of Marengo

County, Alabama, in Mortgage Record Volume 334 at Page 469.

(b) On to-wit, March 22, 1952, the said George H. Jay and Marjorie A. Jay did convey the above described real property to Elmer Russell Wood for a consideration of $12,500.00, in which said deed the grantee therein named assumed and agreed to pay the above described note and mortgage executed to the said H. A. Feibelman, and which said deed to the said Wood was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on March 24, 1952, and was recorded in Deed Record Volume 4-N at page 271.

(c) Thereafter the said Feibelman died leaving a will which was probated in the Probate Court of Marengo County, Alabama, and in which said will the said above described note and mortgage were devised and bequeathed to Robertson Banking Company, a corporation, of Demopolis, Alabama, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper as co-trustees under the terms and conditions as set forth in said will and pursuant thereto, and a decree of the Circuit Court of Marengo County, Alabama, In Equity, entered on February 14, 1953, the Executors named in the will of the said Feibelman did execute a conveyance transferring the said above described note and mortgage to the said co-trustees, which conveyance was executed by the said executors on February 20, 1953, and which was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on February 25, 1953, and recorded in Release and Power of Attorney Record, Volume 7, at page 292.

(d) Thereafter on September 22, 1953, before said fire the said Elmer Russell Wood and his wife, Lottie M. Wood, conveyed by warranty deed the above described real property to W. E. Curb for a consideration as expressed in said conveyance of $700.00 and the assumption of the above described note and mortgage, which said conveyance was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on September 24, 1953, and recorded in Deed Record Volume 4-R at page 6.

(e) Thereafter the said W. E. Curb did on to-wit, March 11, 1955, convey the above described real property by warranty deed to John C. Barnes, Jr. and Margaret Coles Barnes for a consideration therein shown to be $100.00 in cash, the execution of a purchase money mortgage in the amount of $6,500.00 and the assumption by the said John C. Barnes, Jr. and Margaret Coles Barnes, of the balance due on the above described mortgage executed by Jay to Feibelman, which said conveyance from Curb to Barnes was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on March 11, 1955, and recorded in Deed Record, Volume 4-S, at page 192.

(f) At the time of said conveyance described in paragraph (e) above the said John C. Barnes, Jr. and Margaret Coles Barnes, and Martha Barnes, the plaintiff herein, did execute a mortgage deed to the said W. E. Curb conveying to him the above described real property as security for 15 promissory notes, each in the amount of $433.33 payable on the "... day of March, 1956", and on the same day of March of each successive year thereafter until all notes should become due and payable, which said

mortgage deed was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on March 11, 1955, and was recorded in Mortgage Record Volume 356 at page 193. As stated, the said above described mortgage was executed not only by the said John C. Barnes, Jr. and Margaret Coles Barnes but by the plaintiff herein Martha Barnes.

(g) On to-wit, March 11, 1955, the plaintiff herein, Martha Barnes, did further execute and deliver to W. E. Curb an agreement denominated a "Subordination Agreement" by the terms of which the said Martha Barnes did agree as follows:

"For value received from W. E. Curb, the receipt of which is hereby acknowledged, I, the said Martha Barnes, do hereby subordinate to that certain purchase-money mortgage this date executed by John C. Barnes, Jr., and wife, and Margaret Coles Barnes, to W. E. Curb in the principal amount of $6 500.00, all of my right, title, interest and claim in and to that certain mortgage heretofore executed by George H. Jay and wife to H. A. Feibelman as recorded in Office of Judge of Probate of Marengo County, Alabama; and I hereby subordinate to said $6,500. mortgage to Curb all right, title claim or interest I may hereafter acquire in said Jay-Feibelman mortgage; Provided, however, that except for the superiority of said $6,500 mortgage held by W. E. Curb and except for the fact that I do hereby forever release and discharge said W. E. Curb from any and all liability under the aforesaid Jay-Feibelman mortgage, the said Jay-Feibelman mortgage, when and if transferred and assigned to the undersigned, shall remain in full force and effect in all things and in all respects."

Said subordination agreement was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on March 11, 1955, and was recorded in Mortgage Record Volume 356 at page 195.

(h) Thereafter by an instrument dated April 18, 1955, Robertson Banking Company, a corporation, S. W. Harper, Jonas Spiro, Jr., and Norman Cohen as Co-trustees under the will of the said H. A. Feibelman, did execute and deliver to the plaintiff, Martha Barnes, an instrument transferring to her for value received the above described mortgage executed by George H. Jay and his wife, Marjorie A. Jay, to H. A. Feibelman, and also the indebtedness secured thereby and the note described therein, and all of their rights, titles and interest as such co-trustees in and to the real property conveyed by the said mortgage deed, which said transfer was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, on April 28, 1955 and was recorded in Release and Power of Attorney Record, Volume 8 at page 51. The said transfer recited that at the time of its execution there was due and unpaid on said above described mortgage note executed by Jay to Feibelman as of March 12, 1955, the principal sum of $4,420.00 and accrued interest to that date in the amount of $125.09, making the amount due $4,545.09.

(i) Defendant avers upon information and belief that the consideration for the transfer of said mortgage was the payment by the said Martha Barnes and by the said John C. Barnes, Jr. and Margaret Coles Barnes of the said sum of $4,545.09 to the said co-trustees under the will of the said Feibelman, this being the full amount due on the indebtedness se-

cured by the mortgage executed by the said Jay to Feibelman so that the said co-trustees sustained no loss but realized in full the indebtedness secured by that mortgage.

(j) Defendant further avers that the policy of insurance described in the complaint, Policy No. OC 41662, was issued by defendants to the said George H. Jay on to-wit, October 3, 1949, for a period of five years to October 3, 1954, which said policy insured the said Jay against loss by fire to a building located on the above described real estate and attached to said policy was a New York Standard Mortgage Clause as set forth in the complaint, the same being made in favor of one D. F. Jacobs of Demopolis, Alabama. Thereafter, and on-to-wit, November 8, 1949, there was attached to said policy of insurance clause as follows:

"It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama as his interest may appear, subject, nevertheless, to all conditions of the policy."

(k) In the said New York Standard Mortgagee Clause there is the following provision:

"Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as

collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim."

3. Because in truth and in fact the co-trustees under the will of the said Feibelman were paid in full the indebtedness due then on the mortgage executed by Jay to Feibelman and have sustained no loss in such sort as that they had any right under the above policy which they could have validly transferred to the plaintiff and which could be made the basis of a suit or action against these defendants;

4. Because there was no contractual obligation on the part of these defendants to any insured named in said policy;

5. Because no insured named in said policy sustained any loss payable to any payee named in said policy, or to the plaintiff as the transferee of any named insured;

(o) If defendants be mistaken in their denial of liability to the plaintiff, then in the alternative they ask the Court to fix the amount of such liability and to order, adjudge and decree that upon the satisfaction of such liability they be subrogated to all of the rights of the plaintiff to any note, mortgage or security held by the plaintiff securing the indebtedness due the co-trustees under the will of the said H. A.

Feibelman as above shown and that she be required upon payment to her to execute to the defendants and that she be required upon payment to her to execute to the defendants all proper and effective instruments or conveyance to invest in defendants all her right, title and interest in and to such security.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

Filed Apr. 18, 1956.

AMENDMENT TO COMPLAINT.

(Title Omitted)

Comes the Plaintiff, Martha Barnes, in the above styled cause and, with leave of this Honorable Court first had and obtained, amends the complaint heretofore filed in this cause as follows, to-wit:

(1) Count One is amended by incorporating therein and making a part thereof the provisions of said insurance policy and indorsements thereto, a copy of which is attached hereto as "Exhibit C".

(2) Count Two is amended as follows, to-wit: the clause, to-wit, "that said insurance policy and all rights therein were transferred by Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as Co-Trustees under the last Will and Testament of Harry A. Feibelman, deceased, to plaintiff by transfer dated, to-wit, the

10th day of May, 1955, and recorded in said Probate Office"; is deleted in its entirety, and in lieu thereof is substituted the following clause, to-wit: "that all of the rights and interest of said H. A. Feibelman, as mortgagee aforesaid, in and to said insurance policy and under all of the provisions of said insurance policy and of all the indorsements thereto, were transferred by Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as Co-Trustees under the last Will and Testament of Harry A. Feibelman, deceased, to plaintiff by transfer dated, to-wit, the 10th day of May, 1955, and recorded in said Probate Office".

(3) Count Two is further amended as follows, to-wit: the clause, to-wit, "and that at the time said mortgage and at the time said insurance policy were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09), which debt is still unpaid"; is hereby deleted in its entirety, and in lieu thereof is substituted the following clause, to-wit, "and that at the time said mortgage and also at the time said rights of said H. A. Feibelman, as mortgagee aforesaid, in said insurance policy and its indorsements, were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, $4,545.09, which debt is still unpaid".

(4) Count Two is further amended by incorporating therein and making a part thereof the provisions of said insurance policy and indorsements thereto, a copy of which is attached hereto as "Exhibit C".

(5) Count Three is amended as follows, to-wit: the clause, to-wit, "that the insured named in said policy, George H. Jay, and wife had executed on, to-wit, October 22, 1949, a mortgage covering said real property to said H. A. Feibelman, which said mortgage, together with indebtedness secured thereunder, and which said policy have been transferred for value to plaintiff and that plaintiff is the present owner of siad mortgage and the indebtedness secured thereunder and of said policy;" is hereby deleted in its entirety, and in lieu thereof is substituted the following clause, to-wit: "that the insured named in said policy, George H. Jay, and wife had executed on, to-wit, October 22, 1949, a mortgage covering said real property to said H. A. Feibelman, which said mortgage, together with indebtedness secured thereunder, and together with all of the rights and interest of said H. A. Feibelman, as mortgagee aforesaid, in and to said insurance policy and under all of the provisions of said insurance policy and of all the indorsements thereto, have been transferred for value to plaintiff, and that plaintiff is the present owner of said mortgage and the indebtedness secured thereunder, and of the rights of said H. A. Feibelman, as mortgagee aforesaid, in said insurance policy and all of its indorsements".

(6) Count Three is further amended as follows, to-wit: the clause, to-wit, "and that at the time said mortgage and at the time said insurance policy were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, Four Thousand Five Hundred Forty-five and 09/100 Dollars ($4,545.09), which debt is still unpaid;" is hereby deleted in its entirety, and in lieu thereof is substituted the following clause, to-wit: "and that at the time said mortgage and at

the time the rights of said H. A. Feibelman, as mortgagee aforesaid, in said insurance policy and its indorsements were transferred to plaintiff, there was due on said mortgage the sum of, to-wit, $4,545.09, which debt is still unpaid".

(7) Count Three is further amended by incorporating therein and making a part thereof the provisions of said insurance policy and indorsements thereto, a copy of which is attached hereto as "Exhibit C".

LLOYD & DINNING,
By W. W. DINNING,
(W. W. Dinning),
Attorneys for Plaintiff.

I hereby certify that I have served a copy of the above Amendment to Complaint on Mr. Joseph S. Mead, Attorney of record for defendants, by mailing a copy thereof on this 16th day of April, 1956, to him at his office, 734 Frank Nelson Building, Birmingham 3, Alabama; and also that a copy of the above Amendment to Complaint has been filed with the Clerk of the U. S. District Court for the Southern District of Alabama, Federal Building, Mobile, Alabama, this date, by mailing him a copy.

W. W. DINNING,
(W. W. Dinning),
One of Attorneys for Plaintiff.

LLOYD & DINNING,
Demopolis, Alabama.

Filed Apr. 19, 1956.

Note

Pages 29 - 38 are
on Card 2.

FURTHER AMENDMENT TO COMPLAINT.

(Title Omitted.)

Now comes the plaintiff, and with leave of the Court first had and obtained, amends her complaint and the original amendment thereto, both of same having been heretofore filed in this cause, by reducing the demand set out in said Complaint and amendment, and in each and every Court thereof, from $4,545.09 to the sum of, to-wit: $4,200.00.

LLOYD & DINNING,
By W. W. DINNING,
(W. W. Dinning).

Filed Apr. 23, 1956.

AMENDMENT TO ANSWER TO COMPLAINT.

(Title Omitted.)

By leave of Court defendants, separately and severally, amend their answer to the complaint and the Third Defense thereof by specifying the following grounds of non-liability:

(n) 6. The policy of insurance was not indorsed payable to the co-trustees under the will of H. A. Feibelman.

7. The plaintiff is not the assignee of H. A. Feibelman.

8. The plaintiff was not the assignee of any valid contractual obligation of the defendants, or either of them.

J. S. MEAD,
Attorney for Defendants.

734 Frank Nelson Bldg.,
Birmingham, Alabama.

I hereby certify that I have served a copy of this Amendment to Answer to Complaint upon Messrs. Lloyd and Dinning, Attorneys for the Plaintiff, on this the 23rd day of April, 1956, by hand.

J. S. MEAD,
Attorney for Defendants.

Birmingham, Alabama.

Filed Apr. 23, 1956.

TRIAL BY COURT AND ORDER OF SUBMISSION

(Title Omitted.)

Comes the Plaintiff, Martha Barnes by her Attorneys, the Honorable H. A. Lloyd and the Honorable W. W. Dinning and also come each of the defendants by their Attorney, the Honorable Joseph S. Mead into open Court and announce ready for trial.

Witnesses are examined and exhibits are offered in evidence and.

Thereupon, the case was taken under Submission by the Court.

Made at Selma, Alabama, this the 23rd day of April A. D., 1956.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered this the 23 day of April, 1956, Minute Entry No. 1945.

WILLIAM J. O'CONNOR,
Clerk,
By JOHN J. O'BRIEN,
Deputy Clerk.

STIPULATION ENTERED INTO BY AND BETWEEN W. W. DINNING AND JOS. S. MEAD, AT SELMA, ALABAMA, ON APRIL 23rd 1956, BEFORE HON. DANIEL H. THOMAS, U. S. DISTRICT JUDGE.

(Title Omitted.)

Judge Thomas:

All right, Mr. Dinning, you and Mr. Mead start at the very first of this chain of events and dictate to Miss Gerhardt such facts as can be stipulated.

Mr. Dinning:

The suit arises on a fire insurance policy No. OC 41662, issued by the defendant companies.

Judge Thomas:

Where is that policy?

Mr. Dinning:
It is in our possession.

Mr. Mead:
I would like to have you produce the original policy, if you will.

Judge Thomas:
The original of which is herewith handed to the Clerk and marked as Plaintiff Exhibit 1.

Mr. Mead:
May I be allowed to inspect it for just a second?

Judge Thomas:
Surely.

Mr. Dinning:
This policy is dated October 3rd, 1949, naming as the insured George H. Jay, in the amount of $5,000.00, with the standard mortgagee clause, naming D. F. Jacob.

Judge Thomas:
It says in the policy "Jacobs".

Mr. Dinning:
The name does not have an s in it, but it does not matter, as the mortgagee thereunder, with an indorsement dated November 8th, 1949, signed by Turpin Vise as Agent for the defendant companies, naming H. A. Feibelman as mortgagee, subject to all conditions of the policy. The standard mortgagee clause above referred to being a paragraph in a two page indorsement containing, sir, many other vital

features of the policy. The property involved is a commercial building in Demopolis, Alabama, together with the lot on which it stands, and was, at the time of the issuance of the policy, owned by George H. Jay. The policy also contains an indorsement showing that the premiums had been paid for the full five year period, upon loan made by the First National Bank of Birmingham. The property was sold by George H. Jay and wife, Marjorie Jay, to Elmer Russell Wood.

Mr. Mead:
That is not complete.

Mr. Dinning:
Do you care to point out in what it is not a complete policy?

Mr. Mead:
This is in your favor and against me, but it does not bear an indorsement dated March 1st, 1952, in which the name of the insured is changed to Elmer Russell Wood.

Mr. Dinning:
We understood it existed, but we didn't have a copy. Shall we stipulate that is a part of the policy?

Mr. Mead:
Yes, and when we introduce that, I will take this copy that is on my record here and we will attach this to the policy.

Mr. Dinning:
All right, sir.

Mr. Mead:

You can put this in as an exhibit to the stipulation.

Mr. Dinning:

By deed dated March 22nd, 1952, reciting consideration of $12,500.00, plus the assumption and agreement to pay that certain mortgage executed by grantors to H. A. Feibelman on October 22nd, 1949, which said mortgage is for $7,000.00, and is recorded in Mortgage Book 334, page 469, Public Records of Marengo County, Alabama.

Judge Thomas:

Which said deed is handed to the Clerk and marked Plaintiff Exhibit 2 to the stipulation.

Mr. Mead:

May I have an opportunity later on to compare these deeds with certified copies which I have. Manifestly, I could not read all these right now.

Mr. Dinning:

That is the original recorded deed.

Mr. Mead:

If you would want to keep the original deed, I have certified copies here which I would be glad to introduce instead, if you later want to substitute.

Mr. Dinning:

Yes, that would be fine. Thank you, Mr. Mead. The property was destroyed or damaged by fire on or about the 22nd day of September, 1953, the fire being of unknown origin. H. A. Feibelman had died prior to the fire, his will leaving this note and mortgage

originally signed by Jay and wife to him to his executors Robertson Banking Company, S. W. Harper, Norman Cohen, and Jonas Spiro, which said note and mortgage were subsequently by order of the Circuit Court of Marengo County, Alabama, In Equity, transferred to the same bank and other parties as co-trustees under the will of said H. A. Feibelman, deceased.

Mr. Mead:

I would like to have incorporated in the stipulation a certified copy of the will of Harry A. Feibelman, which was probated in the office of the Judge of Probate of Marengo County on December 28th, 1951, and I would suggest that later on we both have an opportunity to scrutinize these documents so no error will creep in the stipulation.

Judge Thomas:

Said will is hereby handed to the Clerk and marked Exhibit 3 to the stipulation.

Mr. Mead.

Mr. Dinning, do you have a certified copy of the decree of the Circuit Court of Marengo County, in Equity, of the deed executed pursuant to that?

A. No, sir.

Mr. Mead:

Then, I would like to have incorporated in the stipulation a certified copy of a deed from the co-executors to the co-trustees under the will of Harry A. Feibelman, which was executed February 20th, 1953, and filed for record in the Probate Office of Marengo County, Alabama, on February 25th, 1953, and re-

corded in Release and Power of Attorney Record Volume 7, page 292, marked as Exhibit 4.

Mr. Dinning:

Two days after the fire, on September 24th, 1953, there was filed for record in the Probate Office of Marengo County, Alabama, an instrument purporting to be a deed from Elmer Russell Wood and wife, Lottie M. Wood, to W. E. Curb, dated, according to the said instrument, September 22nd, 1953, and reciting the following consideration: $100.00 and payment of $600.00 interest and taxes, due October 1st, 1953, and the assumption of $7,000.00 principal mortgage, of record on said property. Certified copy of said instrument, which is recorded in Deed Book 4-R, page 6, of the Probate Office of Marengo County, Alabama, being handed to the Clerk herewith as Exhibit 5. On the 18th of April, 1955, the Robertson Banking Company, a corporation, Norman Cohen, Jonas Spiro, Jr., and S. W. Harper, as co-trustees under the last will and testament of Harry A. Feibelman, deceased, transferred, sold and conveyed unto Martha Barnes, the Plaintiff, the aforesaid mortgage from George H. Jay and wife, Marjorie Jay, to H. A. Feibelman, dated October 22nd, 1949, and recorded in Book 334, page 469, said transfer of mortgage reciting therein that the mortgage and the indebtedness had been transferred from the aforesaid co-executors of H. A. Feibelman to the aforesaid co-trustees of H. A. Feibelman, and that it transfers to Martha Barnes the mortgage and the indebtedness secured thereunder, the note described, and all the right, title and interest of the undersigned, and warrants and represents that as of March 12th, 1955, the principal sum of $4,420.00 and accrued interest to the same date of

March 12th, 1955 in the amount of $125.09, making an aggregate sum of $4,545.09 was due on said mortgage; that the undersigned were vested with full power to execute the instrument, and had received from Martha Barnes the full consideration in payment for the transfer; that said transfer of mortgage is recorded in Book 8 of Release and Powers of Attorney, Page 51, Marengo County Probate Office, a certified copy of which is herewith handed to the Clerk as Plaintiff Exhibit 6. That instrument dated May 10th, 1955, from the same co-trustees, under the will of Harry Feibelman, deceased, was executed, reciting consideration of $1.00 and other good and valuable considerations, cash in hand paid by Martha Barnes, and releasing and assigning over to Martha Barnes all of the rights of the co-trustees in the above mentioned policy OC 41662.

Mr. Mead:

I have never seen this instrument here.

Mr. Dinning:

Which said transfer and assignment of the policy is handed to the Clerk as Plaintiff Exhibit 7.

It is stipulated that the statute of limitations applicable to this cause of action is six years.

Judge Thomas:

It is stipulated between the parties that the policy was in full force and effect on the date of the fire, so far as payment of premiums was concerned.

Mr. Dinning:

The premises were being used at the time of the fire as a bus station and ice cream parlor or cafe,

under the possession and operation of one, L. B. Bain, a tenant of Elmer Russell Wood. The company received due notice of the fire.

Mr. Mead:

The policy has not been paid to any person, though demands have been made on us to pay W. E. Curb, Elmer Russell Wood, the co-trustees under the will of Harry A. Feibelman, and the plaintiff in this case, Mrs. Martha Barnes. To this point, we have made no payment to any person.

Mr. Mead:

I would like to stipulate and introduce the original mortgage by George H. Jay to H. A. Feibelman, which is recorded in Mortgage Book Volume 334, page 469, in the Office of the Judge of Probate of Marengo County, Alabama, as Exhibit 8 to the stipulation.

Judge Thomas:

It is further stipulated that instrument dated March 11th, 1955, recorded in Mortgage Book 356, Page 195, Probate Records, Marengo County, Alabama, was executed by the plaintiff on the day the same bears date, and marked Exhibit 9 to this stipulation.

Mr. Mead:

It was delivered. I would like to also introduce a mortgage instrument, executed by John C. Barnes, Jr., Martha Barnes, the plaintiff, and Margaret Coles Barnes, bearing date the 11th day of March, 1955, recorded in the Office of the Judge of Probate of Marengo County, Alabama, in Mortgage Book Volume 356, page 193; I would like to have it admitted that instrument was executed by the plaintiff and the

others and was delivered, and is attached to this stipulation as Exhibit 10. I would like also to stipulate that by warranty deed, dated the 11th day of March, 1955, W. E. Curb deeded the property involved in this litigation to John C. Barnes, Jr., and Margaret Coles Barnes, that the same was filed for record in the Office of the Judge of Probate of Marengo County, Alabama, Deed Record 4-S, Page 192. I would like to have it stipulated that that instrument was executed and delivered. Said deed is marked Exhibit 11.

Mr. Dinning:
Because of the similarity of the names, Margaret Coles Barnes is the mother of John C. Barnes, Jr., and is not the Plaintiff.

Mr. Mead:
It is also stipulated that Martha Barnes is the wife of John C. Barnes, Jr.

Mr. Dinning:
We would like to stipulate that based on Mr. Seay's statement this morning that the deed was transferred from Wood to Curb in Mr. Seay's office, in Marion, Perry County, Alabama, about 6:30 P. M. on September 22nd, 1953, based on that stipulation, and further stipulation that the defendant companies have no agents in Marion, Alabama, or in Perry County, where that transfer is purported to have taken place, and that according to the statement of the agent, Turpin Vise, notice was received in the mail the following day from Mr Curb of the transfer of the property and request for a change of policy, Mr. Vise's office being now in Greensboro in Hale County, and being at that time in Newbern in Hale

EXHIBIT "C"

STANDARD POLICY

No. OC 41662
Renewal of Number

MUTUAL COMPANY
Nonassessable Policy

THE JEFFERSON MUTUALS

Combination Policy
Issued By
LITITZ MUTUAL INSURANCE COMPANY, LITITZ, PENNSYLVANIA
IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, GRAND FORKS, NORTH DAKOTA

PERIL(S)	AMOUNT	RATE	PREMIUM
Fire and Lightning	$ 5,000.00	9.08 (10.68)	$ 454.00
Extended Coverage (when endorsement attached)		.816 (.96)	$ 40.80
Windstorm and Hail (when endorsement attached)			
Unearned Premium Endorsement			$ 2.45
additional coverages (when endorsement attached)			
		total premium	$ 497.25

No insurance attaches in connection with the above listed Perils unless specific "Premium" therefor is specified in the face of this policy (or in endorsements attached hereto).

In Consideration of the Provisions and Stipulations Herein or Printed on the Back Hereof or Added Hereto AND OF the premium above specified

(Or specified in endorsement attached hereto) this Company, for the term of Five Years from October 3, 1949 At Noon (Standard Time) to October 3, 1954 At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure George H. Jay and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at Birmingham, Alabama.

LITITZ MUTUAL INSURANCE COMPANY, Lititz, Pennsylvania

/s/ Henry B. Gibbel ,Secretary /s/ Harry H. Koser, Pres.

IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Grand Forks, North Dakota

/s/ J. W. Falkanger ,Secretary /s/ A. W. Nyguard, Pres.

Countersigned this
3 day of October, 1949

W. VILLADSEN
/s/ W. Villadsen Agent.

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by the owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

ATTACH FORM BELOW THIS LINE

Form 295-6M-3.49.7.B

FINANCED PREMIUM ENDORSEMENT
TO BE USED ONLY WHEN UNEARNED PREMIUM IS INSURED

The Premiums on this policy have been financed by the assured through The First National Bank of Birmingham, Birmingham, Alabama, under an agreement which specifies that default in the payment of any installment due thereunder shall be deemed to be a request for cancellation or termination of this policy by the assured, and that upon such default this policy, and all certificates issued in connection therewith are to be returned and surrendered.

Said agreement also assigns and transfers all unearned or return premiums and dividends hereon, and all rights under the clause insuring the unearned premium, with the consent of the Insurance Company, to said Bank, as security for the repayment of the premiums advanced on this policy.

All other terms and conditions of the policy not in conflict herewith remain unchanged.

Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals issued at its Birmingham, Alabama Agency.

W. VILLADSEN
Dated October 3, 1949 /s/ W. Villadsen , Agent

MERCANTILE FORM No. 602
Alabama
Without Co-Insurance Georgia

Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals issued at its Birmingham, Alabama Agency.

W. VILLADSEN
/s/ W. Villadsen Agent.

Building Location and Description: 22 North Washington Street
City or Town of Demopolis - State of Alabama
One story, frame, approved

*1. $5,000.00 On the above described building occupied as a Ice Cream Parlor, including stationary building service equipment and detachable parts thereof; also, up to 1% of the amount of this item on personal property and materials belonging to the Insured (and not otherwise covered) pertaining solely to the service of the building, all while contained therein or while contained in buildings located on the described premises, except as otherwise excluded.

*2.$ Nil On all contents usual or incidental to the business of _____ (except motor vehicles, boats and aircraft); the property of the Insured is liable while contained in the above described building or while within 100 feet thereof if in the open or in vehicles on land, including building improvements (if the Insured is not the owner of the building and the improvements are not insured jointly with others), except as otherwise excluded.

*3.$ Nil On furniture, fixtures, equipment and supplies usual or incidental to the business of _____ (except motor vehicles, boats and aircraft) while contained in the above described building or while within 100 feet thereof if in the open or in vehicles on land, including building improvements (if the Insured is not the owner of the building and the improvements are not insured jointly with others), except as otherwise excluded.

*4.$ Nil On stock of merchandise usual or incidental to the business of _____ (except motor vehicles, boats and aircraft); the property of the Insured or for which the Insured is liable while contained in the above described building or while within 100 feet thereof if in the open or in vehicles on land, except as otherwise excluded.

*5.$ Nil On _____ (describe) _____

*6.$ Nil On _____ (describe) _____

*Insurance attaches only to those items for which an amount is shown in the space provided therefor and not exceeding said amount.

Other Insurance—Total insurance, including this policy, is limited to the following amounts:

Item 1, $5,000.00; Item 2, $___; Item 3, $____; Item 4, $____; Item 5, $____; Item 6, $____.

If no amounts are shown above, the total insurance is limited to the amount of this policy.

Extended Coverage (Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Smoke, Vehicles, Except as Hereinafter Provided): Coverage against the perils indicated in the above caption in accordance with and subject to all the terms and conditions of the Extended Coverage appearing on the reverse side of this form will become effective only in consideration of an additional premium next specifically inserted herein. Additional Premium, $40.80.

Unearned Premium Clause—In consideration of $2.45 additional premium this policy covers $494.80 on premiums charged for this policy (but not this Clause) which, by virtue of a loss under this policy, becomes earned for the unexpired term. The limit of liability under this Clause shall be computed on a pro rata basis, being such proportion of the premiums charged under this policy as the number of days from date of loss to expiration bears to the number of days in the policy term, and the amount recoverable hereunder shall not exceed the limit of liability nor a pro rata proportion thereof for partial loss. If this policy be divided into two or more items (not including this Clause), the foregoing provisions of this Clause shall apply to each item separately.

Fire Protection Clause—Printed on the reverse side of this form does _____ apply.

Mortgagee Clause—Loss, if any on building items, shall be payable to:
(1) D. F. Jacobs, Demopolis, Alabama;
(2) _____,
as interest may appear, subject to provisions of the Mortgagee Clause appearing on the reverse side of this form.

Automatic Reinstatement Clause—The amount of insurance hereunder involved in a loss payment of not more than One Hundred Dollars ($100.00) under this policy shall be automatically reinstated.

Electrical Apparatus Clause—If electrical appliances or devices (including wiring) are covered under this policy, this Company shall not be liable for any electrical injury or distrubance to the said electrical appliances or devices (including wiring) caused by electrical currents artifically generated unless fire ensues, and if fire does ensue this Company shall be liable only for its proportion of loss caused by such ensuing fire.

Work and Materials Clause—Permission granted for such use of the premises as is usual and incidental to the occupancy as herein described.

THE PROVISIONS PRINTED ON THE REVERSE SIDE OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF UNLESS INDICATED TO THE CONTRARY.

(608-5-49)

Fire Protection Clause (Applies unless indicated to the contrary on reverse side in space provided)——In consideration of the rate at which this policy is written it is stipulated that the Insured shall exercise due diligence in maintaining in complete working order all equipment and services, installed for the detection, prevention and extinguishment of fire in the property covered by this policy and under the control of the Insured. It is further stipulated that no change shall be made in any sprinkler system, its water or chemical supplies, or any watchman service without the approval in writing of this Company, either direct or through the Rating Bureau having jurisdiction.

Alterations and Repairs Clause——Permission granted to make alterations, additions and repairs to the above described building(s) and this policy, in accordance with its conditions, shall include (so far as it covers on the building) such additions, alterations and repairs, also materials and supplies for same in the building or on open premises adjacent thereto, and (so far as it covers on the contents) shall include said contents contained in such new additions. This permit does not waive or modify any of the terms or conditions of the Fire Protection Clause, if any, attached to this policy. However, should any of the property covered by this policy be protected by an automatic sprinkler system, no reconstruction or enlargement of that property is permitted unless notice of change and proper charge, if any, for same is endorsed hereon; endorsement shall clearly specify changes contemplated and shall be limited to sixty days from a specified date.

Mortgagee Clause (This entire clause is void unless name of mortgagee or trustee is inserted on reverse side in space provided)——Loss, if any on building items under this policy, shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, That in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.

The Above Mortgagee Clause DOES NOT apply to personal property.

EXTENDED COVERAGE (Applies only in consideration of Additional Premium shown on the reverse side in space provided)——

In consideration of the premium for this coverage shown on reverse side hereof, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this Extended Coverage is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES AND SMOKE.

This Extended Coverage does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this Extended Coverage shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements (but not the Extended Coverage), to the perils covered by this Extended Coverage, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this Extended

Coverage than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically covered, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.

Waiver of Policy Provisions: A claim for loss from perils included in this Extended Coverage shall not be barred because of change of occupancy nor because of vacancy or unoccupancy.

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) show storm, tidal wave, high water, overflow or ice (other than hail), whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the property covered therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the property covered therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy by separate and specific item(s), or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings, or (b) windmills, windpumps or their towers, or (c) crop silos (or their contents), or (d) cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (e) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Deductible Clause (Applicable to Windstorm or Hail property damage coverage only): In consideration of the rate of premium at which this policy is written, it is a condition of this contract that loss by any one windstorm and/or hailstorm to the extent of $50.00 is not recoverable and this policy is liable only for loss in excess thereof or its pro rata share in excess thereof if there be other insurance. This condition shall apply (1) separately to each building or structure and the contents therein, if under same ownership, and (2) separately to building or structure and separately to contents therein, if under different ownership; whether such insurance be written under specific, blanket or reporting form.

Provisions Applicable Only to Explosion: Loss by explosion shall include direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox (or the combustion chamber) of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom but this Company shall not be liable for loss by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly-wheels, owned, operated or controlled by the Insured or located in the building(s) described in this policy.

Any other explosion clause made a part of this policy is superseded by this Extended Coverage.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotions: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to

change in temperature or interruption of operations, is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: The term "vehicles," as used in this Extended Coverage, means vehicles running on land or tracks but not aircraft. Loss by aircraft or by vehicles shall include only direct loss resulting from actual physical contact of an aircraft or a vehicle with property covered hereunder, except that loss by aircraft includes direct loss by objects falling therefrom. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the Insured or by any tenant of the described premises; (b) by any vehicle to fences, driveways, walks or lawns; (c) to any aircraft or vehicle including contents thereof other than stocks of aircraft or vehicles in process of manufacture or for sale.

Provisions Applicable Only to Smoke: The term "smoke" as used in this Extended Coverage means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to a chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only when this Extended Coverage is attached to a Policy Covering Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions or Consequential Loss: When this Extended Coverage is attached to a policy covering Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions or Consequential Loss, the term "direct", as applied to loss, means loss as limited and conditioned in such policy, resulting from direct loss to described property from perils insured against; and, while the business of the owner or tenant(s) of the described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

CAUTION—WHEN THIS EXTENDED COVERAGE IS PURCHASED WITH ONE FIRE POLICY, THE INSURED SHOULD SECURE LIKE COVERAGE ON ALL FIRE POLICIES COVERING THE SAME PROPERTY. (440,442), (600,602)

ENDORSEMENT No. 280

Please fill out blanks to avoid non-approvals because of insufficient information to check

Policy No. 41662

Agency at Birmingham, Alabama
(It is highly important that location of agency be stated)

This Space for Home Office Use

Jefferson Mutuals
(Name of insurance company)

of Birmingham, Alabama Date of Endorsement October 3, 1949

Name of Insured George H. Jay

Old Location of Property (St. and No.) 22 N. Washington Street
New Location of Property (St. and No.) 221 E. Washington Street, N/S
Town Demopolis, Alabama Sht. No. ____ Blk. No. ____
Property Insured
(State whether building, machinery, stock, etc., and whether specific or blanket. If specific, state amount on each item, if more than one.)

Date of Policy October 3, 1949 Expiration October 3, 1950 Amount $5,000.00
Old Rate ____ New Rate ____ Return Premium $ ____ Additional Premium $ ____

Full Copy of Endorsement

It is hereby understood and agreed that the correct location of the property insured under the above policy is 211 E. Washington Street, N/S. Demopolis, Alabama instead of as originally written.

All other terms and conditions remain the same.

W. VILLADSEN

/s/ W. Villadsen Agent.

The insured is hereby notified that by virtue of this policy he is a member of the Litits Mutual Insurance Company, and that the annual meetings of such Company are held at its home office on the second Saturday of January of each year at 2 o'clock P. M.

The insured is hereby notified that by virtue of this policy he is a member of the Implement Dealers Mutual Fire Insurance Company, and that the annual meetings of such Company are held at its home office on the second Tuesday of April of each year at 2 o'clock P. M.

W. J. PERRYMAN & CO., INC.

General Agents

BIRMINGHAM, ALABAMA

FC13-X

BIRMINGHAM, ALA. 922-201-01
NON-ASSESSABLE
STANDARD POLICY

Expires October 3, 1954
Property 22 North Washington Street
(peril covered) Fire Amount $5,000.00
(peril covered) E.C. Amount $
(peril covered) T.P. Amount $

Total Premium - - - - - - - - - $ 497.25
Insured George H. Jay
Demopolis, Alabama

SEE INSIDE OF POLICY FOR PERILS COVERED

NO. CC 41662

THE JEFFERSON MUTUALS

LITITZ MUTUAL INSURANCE COMPANY
Lititz, Pennsylvania

IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY
Grand Forks, North Dakota

W. J. PERRYMAN & COMPANY, INC.
410 North 21st Street
Birmingham 3, Alabama

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

No. of Policy
No. of Renewal
Amount Insured

	YEAR	MO.	DAY
Date of Cancel.,			
" Policy,			
Time in Force,			

Premium Paid,- - - - - - - - - -
" earned at rate,
" returned, - - - - - -
If pro rata, state reason why:

RECEIPT FOR RETURN PREMIUM
To be Signed by the Insured

_____ Agency _____ 19___

IN CONSIDERATION OF

_____ Dollars

return premium, receipt of which is hereby acknowledged, this Policy is hereby cancelled and surrendered to the Company.

_____ Insured

U.S. DISTRICT COURT
SOUTH. DIST. ALA.
FILED IN CLERK'S OFFICE
APR 19 1956
WILLIAM J. O'CONNOR
CLERK

No. 520

LOSS PAYABLE

It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H.A. Feibelman, Demopolis, Alabama as his interest may appear, subject, nevertheless, to all conditions of the policy.

Attached to and forming part of Policy No. 11662 of the Jefferson Mutuals (name of insurance company) issued at its Newbern, Alabama (city, state) Agency.

Dated November 8, 1949. /s/ Turpin Vise Agent.
Turpin Vise

(3-49)

NON-ASSESSABLE CONDITION

This policy is issued by Mutual Companies having special regulations lawfully applicable to their organization, membership, policies or contracts of insurance, of which the following shall apply: THIS POLICY IS NON-ASSESSABLE, AND THE INSURED'S LIABILITY IS LIMITED TO THE PAYMENT OF THE PREMIUM AS HEREIN PROVIDED.

PROVISIONS SPECIALLY APPLICABLE TO THIS COMBINATION POLICY

This policy is made and accepted subject to the stipulation and agreement that each of the Companies executing this policy, contracts severally and not jointly, and each of said Companies is liable for that proportion of loss or damage covered by this policy, as set forth below, and not otherwise.

The LITITZ MUTUAL INSURANCE COMPANY, Lititz, Pennsylvania, severally assumes one-half the liability for any loss or damage under this policy.

The IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Grand Forks, North Dakota, severally assumes one-half the liability for any loss or damage under this policy.

County, and the property being located in Demopolis, in Marengo County.

Mr. Mead:

I really didn't see the mailing date of that at all. Any request to change the policy was received by Mr. Turpin Vise after the destruction of the property by fire. After the fire, a request was made to transfer the policy, and the policy was not transferred, as is shown by the policy itself, and the request was received by the agent of the defendant companies after the destruction of the building by fire.

Judge Thomas:

It is further stipulated that said notice was postmarked Marion, Alabama, 2:00 P. M. the day following the fire, and was received by Mr. Vise either that afternoon or the following morning.

I think you have covered all instruments bearing any title to this property. It is further stipulated that for the purpose of this lawsuit George H. Jay held the record title to the property on the .... day of ..... and that all transfers affecting title from that day to the present have been introduced in evidence. It is stipulated that the fire in question occurred on September 22nd, 1953, at 10:40 P. M.

Mr. Mead:

We will stipulate this information into the record from the officer's record of the fire.

Judge Thomas:

It is further stipulated that in the opinion of the Chief of the Fire Department of Demopolis, the fire-

had been burning perhaps in the neighborhood of thirty minutes prior to its discovery at 10:40 P. M.

Filed May 2, 1956.

AMENDMENT TO STIPULATION OF APRIL 23, 1956.

(Title Omitted.)

Now come the parties by their attorneys and amend or interpret the stipulation entered into in open Court on the 23rd day of March, 1956, in the following particulars:

(1) The deed to the property involved in this litigation from Elmer Russell Wood to W. E. Curb was executed and was delivered from Wood to Curb in the office of Mr. Thomas Seay, Attorney, at Marion, Perry County, Alabama, at or about 6:30 o'clock P.M. (fifteen minutes more or less) on September 22, 1953.

(2) Title to the property involved in this litigation is assumed in George H. Jay as of the 22nd day of March, 1952.

(3) The fire that damaged the subject of insurance involved in this litigation had its inception at or about 10:10 o'clock P.M. (fifteen minutes more or less) on September 22, 1953.

(4) The premium due on the policy of insurance involved in this litigation was financed by George H.

Jay, the original insured, with The First National Bank of Birmingham, Alabama, by a premium note dated October 3, 1949.

The insurance company defendants were paid the total amount of the premium due on the policy involved by money borrowed from The First National Bank of Birmingham by Jay a short time after the date of the premium financing note, October 3, 1949.

Payments were made to The First National Bank of Birmingham of all the installments, the last installment having been paid by a check executed by George H. Jay.

There has been no request by any person for the cancellation of the policy involved nor the return of any premium, and no premium has been returned as of this date.

This 31st day of May, 1956.

LOYD & DINNING,
(Lloyd & Dinning),
By W. W. DINNING,
(W. W. Dinning),
Attorneys for Plaintiff.
J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

Filed Jun. 5, 1956.

MOTION.

(Title Omitted.)

Now come the defendants in the above entitled cause and move the Court to allow them to amend their pleas and to file the amendment attached hereto for the purpose of meeting the evidence already adduced in this cause.

J. S. MEAD,
Attorney for Defendants.

734 Frank Nelson Bldg.,
Birmingham, Alabama.

Filed Jun. 19, 1956.

AMENDMENT TO THIRD DEFENSE.

(Title Omitted.)

Now come the defendants and with leave of Court first had and obtained amend their Third Defense heretofore filed in this cause by striking paragraph (n) thereof and in lieu thereof inserting the following:

(n) Defendants deny that they are liable to the plaintiff under the terms and provisions of the said policy of fire insurance by reason of the matters and things hereinabove set forth and for the following reasons:

1. The plaintiff by the execution of the above described mortgage and subordination agreement to the

said W. E. Curb has released a part of the security to which the said Wood was entitled upon paying the mortgage debt, and she has thereby released the said Wood and Wood's sureties, the defendants.

2. The plaintiff has released the said W. E. Curb and, therefore, has released the said Wood and his sureties, the defendants.

3. The plaintiff has destroyed the right of the said Wood as a surety and of these defendants under the terms and provisions of the policy contract involved to be subrogated to a first mortgage on the property involved.

4. The said Wood had no insurable interest in the said property at the time of the fire because, by plaintiff's actions as hereinabove shown, she released him as a surety for the mortgage debt.

5. Inasmuch as at the time of the loss the defendants were not liable to either the mortgagor or to the owner of the property, they were entitled to a transfer of the mortgage indebtedness upon demand therefor, which right of the defendants the plaintiff denies and refuses to accord.

6. There was no transfer of the said insurance policy or any right therein from the said Feibelman or from the co-executors under his will.

7. If the plaintiff is allowed to recover in this suit, she must credit the amount of the recovery to the mortgage indebtedness, and such credit will enure to the benefit of her husband and mother-in-law and re-

bate the purchase price of the property acquired by them at the expense of the defendants, who owe them no duty and would result in constituting the policy of insurance issued by the defendants a wager agreement and not one of indemnity merely.

Paragraph (o) of said Third ~~Defense~~ is stricken and in lieu thereof defendants add the following paragraph:

(o) If the Court should find that the defendants are mistaken in their denial of liability to the plaintiff, then in the alternative, they ask that the Court fix the amount of such liability and that it enter an order or decree adjudging that the defendants shall pay to the plaintiff such sum, upon condition that simultaneously therewith the plaintiff shall by appropriate instrument convey, set over, assign and deliver to the defendants a first mortgage on the property hereinabove described, that is to say, the same mortgage executed by George H. Jay to H. A. Feibelman and hereinabove described, unencumbered and unsubrogated to the lien of any other mortgage; and defendants further pray that if the amount of the mortgage debt and all lawful charges shall be found to be more than the amount of loss sustained as to the said building by fire, then the defendants offer to the plaintiff in addition to the amount of such damage a sum sufficient to completely discharge the amount of the indebtedness due her as shown by the evidence adduced in this cause plus all lawful charges, and ask that the Court order, adjudge and decree that upon the payment to the plaintiff of the full amount of the mortgage indebtedness and all lawful charges, she shall by proper instrument be required to convey,

set over and assign to the defendants the valid first mortgage executed by the said George H. Jay to H. A. Feibelman; and defendants pray for such other, further or different relief as to which they have shown themselves entitled by the evidence adduced and which may seem to the Court meet, proper and equitable. And defendants offer to do equity and to return any portion of the premium on the policy of insurance to any person who may be found entitled thereto, and also to do or perform any other act or duty which in equity and good conscience they ought to do or perform.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

I hereby certify that I have mailed a copy of the foregoing motion and amendment to Messrs. Lloyd and Dinning, Attorneys of Record for the Plaintiff, at their offices in Demopolis, Alabama, on 18th day of June, 1956.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

Filed Jun. 19, 1956.

ORDER GRANTING DEFENDANTS LEAVE TO AMEND PLEAS.

(Title Omitted.)

This cause having been taken under submission on the 19th day of July 1956, on the motion of defendants for leave to amend their pleas; and the Court having considered the said motion with the proposed amendment, and the arguments of counsel with reference thereto, and being of the opinion that leave to amend should be granted, it is

Ordered, Adjudged and Decreed that the defendants' motion be granted, and they hereby are allowed to amend their pleas according to the amendment filed with their said motion on June 19, 1956.

Done this the 25th day of July 1956.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered this the 25 day of July, 1956, Minute Entry No. 2315.

WILLIAM J. O'CONNOR,
Clerk,
By JOHN J. O'BRIEN,
Deputy Clerk.

FINDING OF FACTS AND CONCLUSIONS OF LAW.

(Title Omitted.)

Action to recover $4200.00 on fire insurance policy by Martha Barnes, plaintiff, and assignee for value of note and mortgage and of mortgagee's rights in the fire insurance policy; submitted to Court, without jury, on complaint and answer, stipulation of facts, exhibits and briefs of the parties.

Finding of Facts.

A stipulation of the parties on file shows that:

1. On October 3, 1949, the defendant insurance companies issued the subject policy to George H. Jay in the amount of $5,000.00, for a total premium of $497.25, for a 5 year period, expiring on October 3, 1954. The full premium was paid in advance. The insured building, a commercial building in Demopolis, Marengo County, Alabama, burned on September 22, 1953, approximately 13 months before the policy expired.

2. The policy named D. F. Jacob as mortgagee, in a New York Standard Mortgagee Clause, which provided that no act of the mortgagor could invalidate the interest of the mortgagee, and that no change of title of the property could invalidate the interest of mortgagee.

3. On November 8, 1949, an indorsement was added to the policy naming H. A. Feibelman as mortgagee, subject to all conditions of the policy, one of

which being the above mentioned New York Standard Mortgagee Clause. Feibelman was the mortgagee in the mortgage of George H. Jay and wife dated October 22, 1949, and securing a debt of $7,000.00.

4. H. A. Feibelman died in 1951 in Demopolis; his Will left certain properties, including the subject note and mortgage and his interest as mortgagee in the subject fire insurance policy, to his Co-Executors, one of same being the Robertson Banking Company of Demopolis; his Will further provided that the named Co-Executors should also be his Co-Trustees, and provided for a continuing trust fund, to be financed from the said properties, including the subject note and mortgage, and giving broad powers of sale and disposition to said Co-Trustees.

5. On February 20, 1953, seven months before the fire, the subject note and mortgage were, by order of the Circuit Court of Marengo County, Alabama, in Equity, and in accordance with the provisions of Feibelman's Will, transferred by deed of said Co-Executors to said Co-Trustees.

6. By deed dated March 22, 1952, George H. Jay and wife conveyed subject building and lot to Elmer Russell Wood for $12,500.00 and the assumption and agreement by Wood to pay the subject note and mortgage in the amount of $7,000.00. By indorsement, the name of the insured owner of the property was changed from George H. Jay to Elmer Russell Wood.

7. On September 22, 1953, at approximately 6:30 P. M., in the office of Attorney Thomas Seay in

Marion, Perry County, Alabama, Elmer Russell Wood and wife conveyed subject building and lot to W. E. Curb, the deed including as consideration the assumption of the $7,000.00 mortgage to Feibelman. Approximately 3½ hours later, on the same day, the building burned, the fire being of unknown origin (according to Chief of the Fire Department of Demopolis, it was caused by old and defective wiring); the fire caused $4,000.00 damage.

8. On March 11, 1955, W. E. Curb deeded the subject building and lot to John C. Barnes, Jr., and his mother, Margaret Coles Barnes for $6500.00, and the assumption of the subject note and mortgage; at the same time, John C. Barnes, Jr., and his said mother mortgaged the property back to W. E. Curb, the plaintiff (wife of John C. Barnes, Jr.) joining in the mortgage merely to release her homestead right. The plaintiff secured no title in said property by the deed to her husband and her mother-in-law. On the same day, the plaintiff executed an instrument to W. E. Curb stating that she was in the process of buying the Feibelman mortgage and note and subordinating her future interest in same to her husband's and mother-in-law's mortgage to Curb, but providing that the Feibelman mortgage would otherwise remain in full force and effect. ($4,545.09 was still due on the Feibelman mortgage at that time.)

9. Plaintiff Martha Barnes paid the Robertson Banking Company and the other Co-Trustees under the Will of H. A. Feibelman the sum of $4,545.09 on April 18, 1955, for the subject note and mortgage, said sum being the total amount of principal and interest still due on said mortgage at that time; she received

a written transfer of said mortgage and of all rights of the Co-Trustees of H. A. Feibelman as mortgagee in the subject insurance policy, and the subject insurance policy was delivered to her by said Co-Trustees.

10. The company received due notice of the fire.

11. The policy contained a provision allowing the insurance company subrogation to the rights of the mortgagee if the company claimed and proved that it had no liability to mortgagor owner at the time of the fire.

12. Claims for payment under the policy were made on defendant insurers by W. E. Curb, Elmer Russell Wood, the Co-Trustees under the Will of H. A. Feibelman, and the plaintiff, Mrs. Martha Barnes. No payment has been made under the policy to any person.

Conclusions of Law.

1. The plaintiff, Martha Barnes, was the assignee and holder for value of all the rights formerly held by H. A. Feibelman as mortgagee, to the extent of the amount still due on the mortgage debt, and, as such, is entitled to the full protection of the New York Standard Mortgagee Clause.[1]

[1] Palisnana v. Bankers & Shippers Ins. Co., 84 N. Y. S.2d 637, aff. 95 N.Y.Y S.2d 543; Kernochan v. N.Y. Bowery Fire Ins Co., 17 N.Y. 428; Waring v. Loder, 53 NY. 581; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442; Lycoming Fire Ins. Co. v.

2. As mortgagee under the New York Standard Mortgagee Clause in the instant policy, the plaintiff, Martha Barnes, was entitled to recover from defendant insurance companies the full amount of the fire damage, stipulated at $4,000.00, together with legal interest. As stipulated, the amount still due on he mortgage debt was $4,545.09.

3. Insurers cannot have subrogation against property of persons who are not parties to the cause. A judgment will be entered in accordance herewith.

October 1, 1956.

(S.) DANIEL H. THOMAS,
United States District Judge.

Filed Oct. 1, 1956.

Jackson, 83 Ill. 302; Cumberman's Nat. Bk. v. Corrigan L66 N.Y. 650, 167 Wisc. 82; Globe v. Rutgers Fire Ins. Co. 91 F2d 635; Ocean Accident & Guarantee Corp., Lt v. Southwestern Bell Telephone Co., 100 F2d 441, Central Union Bank of South Carolina, 52 F2d 823; Breeyear v. Rockingham Farmers Mut. Fire Ins. Co., 52 A 860, 71 N.H. 445.

JUDGMENT.

In the United States District Court for the Southern District of Alabama, Northern Division.

Martha Barnes, Plaintiff,
vs. Civil Action No. 1539.
Lititz Mutual Insurance Company, et al., Defendants.

Findings of fact and conclusions of law having been filed in this cause on this date, holding the plaintiff entitled to recover, now, therefore, it is

Ordered, Adjudged and Decreed by the Court that the plaintiff have and recover of the defendants the sum of Four Thousand Dollars ($4,000.00), together with interest at the rate of 6% per annum from September 22, 1953, for all of which let execution issue.

Done at Mobile, Alabama, this 1st day of October 1956.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court Sou. Dist. Ala., Filed and Entered this the 1 day of October, 1956; Minute Entry No. 2552, William J. O'Connor, Clerk, By Wm. J. O'Brien, Deputy Clerk.

DEFENDANTS' MOTION FOR MODIFICATION OF THE FINDINGS AND JUDGMENT OF THE COURT, OR FOR A NEW TRIAL.

(Title Omitted.)

Come now the defendants in the above styled cause and move the Court to amend, alter or modify its findings of facts and conclusions of law and the judgment based thereon, entered herein on October 1, 1956, or to vacate and set aside said findings and said judgment, and to render a judgment in favor of defendants, or to reopen said judgment and findings and to award defendants a new trial or hearing in this cause, and as grounds for said motion set down and assign the following, separate and several, grounds:

1. Finding of Fact No. 3 is contrary to the evidence in that the policy of insurance introduced into evidence as Exhibit No. 1 clearly shows H. A. Feibelman was not named as mortgagee in the policy, but was merely named as payee of any loss due the insured under the policy in a simple loss payable clause.

2. The Finding of Fact designated No. 8 to the effect that the plaintiff joined in the mortgage dated March 11, 1955, to Mr. W. E. Curb merely to release her homestead right is contrary to the evidence in that the recitals of said mortgage introduced into evidence as Exhibit No. 10 clearly show that the plaintiff was one of the principal debtors of the debt secured by said mortgage and that in said mortgage

she warranted to the mortgagee her ownership of the said property.

3. Conclusion of Law designated as 1 is contrary to the facts in that there was not shown to be any transfer of the rights held by H. A. Feibelman under the policy sued on to the plaintiff.

4. Conclusion of Law designated No. 1 is contrary to the facts in that the facts show that the plaintiff, if anything, succeeded to the righs only of a payee of the interest of the insured under a simple loss payable clause rather than to the rights of one protected by the New York Standard Mortgagee Clause.

5. Conclusion of Law designated No. 2 is incorrect in assuming the plaintiff to be a mortgagee under the New York Standard Mortgagee Clause, which assumption was completely unsupported by the evidence.

6. The assumption in Conclusion of Law designated No. 2 that plaintiff was entitled to interest is contrary to law, in that there was no evidence introduced showing that the plaintiff was entitled to any interest whasoever.

7. Conclusion of Law designated No. 3 is not responsive to and pretermits the issues in this case with respect to subrogation; defendants were not seeking subrogation in this case against the property of persons not parties to the cause; they were seeking to be subrogated to the rights of the plaintiff in the note and mortgage which she secured from the estate of Feibelman; this note and mortgage was the

property of the plaintiff and not the property of persons who were not parties to the cause.

8. The judgment of the Court is erroneous in awarding any interest to the plaintiff.

9. The judgment of the Court was erroneous in awarding interest to the plaintiff from September 22, 1953.

10. The findings and judgment of the Court pretermits the defense raised by the pleadings and established by the proof to the effect that no liability existed to plaintiff on account of her destruction of the right of these defendants under the terms and provisions of the policy contract sued on to be subrogated to a first mortgage on the property involved; hence, defendants say that the findings of the Court should be amended to disclose these facts and the judgment in favor of plaintiff vacated and one rendered in favor of defendants.

11. The findings of the Court are silent upon the issue of the release of Curb and of all prior sureties, including defendants, on the subject mortgage indebtedness by the action of the plaintiff in executing and delivering that certain instrument introduced into evidence as Exhibit No. 9; hence, defendants say that the findings should be amended to disclose the existence of such facts, and that the judgment in favor of plaintiff should be vacated and one rendered in favor of defendants.

12. The findings and conclusions of the Court are erroneous in failing to set forth the proposition clear-

ly established by the evidence, that defendants, if held liable to the plaintiff, were entitled to be subrogated to the rights of the plaintiff in the subject mortgage.

13. The judgment of the Court is incorrect, erroneous and contrary to the evidence and law in failing to set forth and declare the defendants' right to be subrogated to the rights of the plaintiff in the subject mortgage, to the extent that the plaintiff was allowed to recover in this action.

14. The findings of fact are contrary to the evidence.

15. The Conclusions of law are not supported by the facts.

16. The conclusions of law are contrary to law.

17. The judgment of the Court is unsupported by the evidence.

18. The judgment of the Court is contrary to law.

19. The findings are contrary to the evidence in that they do not find that defendants were not liable under the policy to the named insured and hence were not liable to plaintiff, insured's loss payee.

20. The findings are contrary to the evidence in that they do not find that defendants are not liable to the owners or mortgagor of the insured property under the policy sued on, and that defendants are, therefore, entitled to be subrogated to the plaintiff's

rights in the subject mortgage to the extent of the payment made to her in this cause.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

734 Frank Nelson Bldg.,
Birmingham, 3, Alabama.

I hereby certify that I have served a copy of the foregoing motion upon Messrs. Lloyd and Dinning, Attorneys of Record for the Plaintiff, by mailing a copy thereof, postage prepaid, to their offices at Demopolis, Alabama, on this 9th day of October, 1956.

J. S. MEAD,
(J. S. Mead),
Attorney for Defendants.

U. S. District Court, Sou. Dist. Ala., Filed in Clerk's Office Oct. 10, 1956, William J. O'Connor, Clerk.

ORDER OF SUBMISSION.

(Title Omitted.)

This cause comes on to be heard in open Court on the Defendants' motion for modification of the Findings and Judgment of the Court, or for a New Trial.

Arguments are heard and

Thereupon, the Defendants' motion was taken under Submission by the Court.

Meade at Selma, Alabama, this the 10th day of December A. D., 1956.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered this the 10 day of December, 1956, Minute Entry No. 2799, William J. O'Connor, Clerk, By J. M. O'Brien, Deputy Clerk.

ORDER DENYING MOTION FOR A NEW TRIAL, MODIFICATION OF FINDINGS OF FACT AND JUDGMENT.

(Title Omitted.)

This cause having been taken under submission on the 10th day of December, 1956, at Selma, Alabama, on the motion of the defendants for modification of the findings and judgment of the Court, or for a new trial; and the Court having considered the said motion, the arguments of Counsel and being of the opinion that the motion of the defendants should be denied,

It Is Now Ordered And Adjudged by the Court that the defendants' motion for modification of the findings and judgment of the Court, or for a new trial be, and the same hereby is, Denied.

Made at Mobile, Alabama, this the 12th day of December A. D., 1956.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered this the 12 day of December, 1956, Minute Entry No. 2804, William J. O'Connor, Clerk, By J. M. O'Brien, Deputy Clerk.

NOTICE OF APPEAL.

In the United States District Court for the Southern District of Alabama, Northern Division.

Martha Barnes, Plaintiff,
vs. Civil Action No. 1539.
Lititz Mutual Insurance Company, Implement Dealers Mutual Fire Insurance Company, and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company doing business as The Jefferson Mutuals, Defendants.

Notice is hereby given that Lititz Mutual Insurance Company, Implement Dealers Mutual Fire Insurance Company, and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company doing business as The Jefferson Mutuals, defendants above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 1st day of October, 1956, and the order denying defendants' motion for modification of the findings and judgment

of the Court, or for a new trial, entered on December 12, 1956.

J. S. MEAD,
Attorney for Appellants, Lititz Mutual Insurance Company, Implement, Dealers Mutual Fire Insurance Company, and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company, doing business as The Jefferson Mutuals.

734 Frank Nelson Building,
Birmingham, Alabama.

Filed Jan. 2, 1957.

SUPERSEDEAS BOND.

(Title Omitted.)

We, the undersigned, jointly and severally, acknowledge that we and our personal representatives are jointly bound to pay to Martha Barnes, plaintiff, the sum of Six Thousand and No/100 ($6,000.00) Dollars.

The condition of this bond is that whereas the defendants have appealed to the Court of Appeals for the Fifth Circuit from the judgment of this Court, entered October 1, 1956, if these defendants shall pay

the amount of the final judgment herein if their appeal shall be dismissed or the judgment affirmed or modified, together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

LITITZ MUTUAL INSURANCE COMPANY,
IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY,

and

LITITZ MUTUAL INSURANCE COMPANY,
IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY,
Doing Business as the Jefferson Mutuals,

By J. S. MEAD,
(J. S. Mead),
Their Attorney.
Defendants-Appellants.

734 Frank Nelson Building,
Birmingham, Ala.

IOWA MUTUAL INSURANCE COMPANY, a corporation,

By WAYNE VILLADSEN,
(Wayne Villadsen),
Its Attorney-in-Fact.
Surety.

DeWitt, Iowa.

Filed Jan. 2, 1957

STATEMENT OF POINTS ON APPEAL.

(Title Omitted.)

The points upon which Appellants will rely on appeal are as follows:

1. The Court erred in holding appellants liable to appellee under the policy of insurance sued on in view of appellee's breach of the provisions of said policy by her actions in destroying appellants' right of being subrogated to a valid first or prior mortgage lien on the insured premises.

2. The Court erred in failing to hold that appellants were not liable to appellee under the policy sued on on account of appellee's impairment of appellants' right under the policy to be subrogated to a first or prior mortgage on the property involved.

3. The Court erred in failing to hold that appellee had released appellants from liability to appellee under the policy by her actions in releasing W. E. Curb and all prior persons liable thereon, from liability on the mortgage indebtedness acquired by her from H. A. Feibelman.

4. The Court erred in failing to hold that appellants were entitled to be subrogated to the appellee's interest in the mortgage indebtedness acquired by her from the representatives of H. A. Feibelman to the extent of the amount of the final judgment rendered by the Court on October 1, 1956, upon payment of such amount from appellants to appellee.

5. The Court erred in failing to recognize and enforce appellants' rights of subrogation to the mortgage indebtedness held and sued upon by appellee.

6. The Court erred in holding that the appellants' right of subrogation could not be recognized in this action.

7. The Court erred in finding that the appellee was the successor in interest to a party protected by the provisions of the New York Standard Mortgagee Clause as contained in the policy.

8. The Court erred in failing to find that the appellee was the successor in interest to a party who was merely a simple loss payee of the interest of the insured named in the policy.

9. The Court erred in finding that the appellee had succeeded to and owned the rights in the policy of the insurance sued on originally held by H. A. Feibelman.

10. The Court erred in holding that the plaintiff was entitled to any interest.

11. The Court erred in holding that the appellee was entitled to interest at six per cent from September 22, 1953, to the date of the final judgment.

12. The Court erred in entering a judgment for appellee for an amount greater than the amount due upon the mortgage indebtedness owned by appellee, as stipulated by and between the parties.

13. The Court erred in not finding that appellants were not liable under the policy of insurance sued on to the owners or mortgagors of the insured property, and hence were entitled to be subrogated to appellee's rights in the mortgage held by her.

14. The Court erred in not finding that appellants were not liable under the policy to the insured named therein, and hence were not liable to appellee, the named insured's loss payee under the provisions of the policy.

15. The Court erred in not finding that appellants were entitled to be subrogated to a first or prior mortgage upon the insured property upon payment to appellee, and that appellee had destroyed this right by subordinating the mortgage security held by her to another mortgage, thus rendering appellants not liable to appellee under the policy sued on.

16. The Court erred in allowing the appellee to recover herein, inasmuch as its judgment made of the policy sued on a gambling or wagering contract, contrary to law and public policy, resulting in unjust enrichment to the owners of the insured property, strangers to the policy of insurance involved.

17. The Court erred in denying defendants' motion for modification of the findings of fact and judgment, or in the alternative for a new trial, in respect to each ground stated in said motion.

JOSEPH S. MEAD,
(Joseph S. Mead),
Attorney for Defendants-
Appellants

734 Frank Nelson Building,
Birmingham 3, Alabama

Certificate of Service.

I hereby certify that I have served a copy of the foregoing Statement of Points on Appeal on Messrs. Lloyd & Dinning, attorneys for the Plaintiff-Appellee, by mailing a copy thereof, postage prepaid, to their office address at Demopolis, Alabama, on this the 12th day of January, 1957.

JOSEPH S. MEAD,
(Joseph S. Mead),
Attorney for Defendants-Appellants.

U. S. District Court, Sou. Dist. Ala., Filed in Clerk's Office, Jan. 14, 1957, William J. O'Connor, Clerk.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Title Omitted.)

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the defendants-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed January 2, 1957, the following portions of the record, proceedings, and evidence in this action:

1. Petition for Removal from Circuit Court of Marengo County, Alabama, together with copy of Summons and Complaint filed September 29, 1955.

2. Notice of Removal filed September 29, 1955.

3. Removal Bond filed September 29, 1955.

4. Answer of Defendants filed October 4, 1955.

5. Further Answer filed by Defendants April 18, 1956.

6. Amendment to Complaint filed April 19, 1956.

7. Further Amendment to Complaint filed April 23, 1956.

8. Amendment to Answer to Complaint filed April 23, 1956.

9. Order of Submission entered April 23, 1956.

10. Stipulation as to the Facts entered into by the parties on April 23, 1956, and filed May 2, 1956, together with all exhibits to said Stipulation, being numbered 1 through 11, both inclusive.

11. Amendment to Stipulation of April 23, 1956, filed June 5, 1956.

12. Motion of Defendants for Amendment of Answer together with Proposed Amendment filed June 19, 1956.

13. Order entered granting Defendants leave to amend Answer filed July 25, 1956.

14. Finding of Facts and Conclusions of Law filed October 1, 1956.

15. Final Judgment entered in favor of Plaintiffs and against Defendants filed October 1, 1956.

16. Defendants' Motion for Modification of the Findings and Judgment of the Court, or for a new trial, filed October 10, 1956.

17. Order of Submission entered after Hearing on Defendants' Motion for Modification filed December 10, 1956.

18. Order Denying Defendants' Motion for Modification filed December 12, 1956.

19. Notice of Appeal filed January 2, 1957.

20. Supersedeas Bond filed January 2, 1957.

21. Statement of Points on Appeal.

22. This Designation of the Contents of the Record on Appeal.

J. S. MEAD,
(Joseph S. Mead),
Attorney for Defendants-
Appellants.

734 Frank Nelson Building
Birmingham 3, Alabama

Certificate of Service.

I hereby certify that I have served a copy of the foregoing Designation of the Contents of the Record on Appeal on Messrs. Lloyd & Dinning, Attorneys for the Plaintiff-Appellee, by mailing a copy thereof, postage prepaid, to their office address at Demopolis, Alabama, on this the 12th day of January, 1957.

J. S. MEAD,
(Joseph S. Mead),
Attorney for Defendants-Appellants.

Filed Jan. 14, 1957.

ORDER CERTIFYING ORIGINAL EXHIBITS UP TO COURT OF APPEALS.

(Title Omitted.)

For cause shown,

It Is Ordered by the Court that the original exhibits hereinafter set out be forwarded to the United States Court of Appeals for the Fifth Circuit, for examination by said Court in connection with the appeal herein and the Clerk of that Court is directed to return said Exhibits to the Clerk of this Court upon the conclusion of the appeal, viz:

Exhibit No. 1—Insurance Policy No. CC-41662, filed on April 23, 1956.

Exhibit No. 2—Certified copy of Deed executed on March 22, 1952, and filed on April 23, 1956.

Exhibit No. 3—Certified copy of the Last Will and Testament of Harry A. Feibelman filed on April 23, 1956,

Exhibit No. 4—Certified copy of Deed from Robertson Banking Company, a corporation, et als., etc., to Robertson Banking Company, a corporation, et als., etc., filed on April 23, 1956,

Exhibit No. 5—Certified copy of Deed executed on September 22, 1953, filed on April 23, 1956,

Exhibit No. 6—Certified copy of Transfer of Mortgage filed on April 23, 1956,

Exhibit No. 7—Assignment dated May 10, 1955, of Policy No. OC 41662, filed on April 23, 1956,

Exhibit No. 8—Certified copy of Mortgage executed on October 22, 1949, and filed on April 23, 1956,

Exhibit No. 9—Certified copy of the Subordinate from Martha Barnes to W. E. Curb, executed on March 11, 1955, and filed on April 23, 1956,

Exhibit No. 10—Certified copy of Mortgage executed on March 11, 1955, and filed on April 23, 1956, and

Exhibit No. 11—Certified copy of Deed executed on March 11, 1955, and filed on April 23, 1956.

Made at Mobile, Alabama, this the 22nd day of January A. D., 1956.

DANIEL H. THOMAS
United States District Judge

CERTIFICATE.

In the United States District Court for the Southern District of Alabama.

I, WILLIAM J. O'CONNOR, Clerk of said Court, do hereby certify that the foregoing Pages Numbered One (1) to Seventy-Two (72), both inclusive, contain a true and correct transcript of the record and proceedings had in said Court in Civil Action File No. 1539, Martha Barnes, Plaintiff, Versus Lititz Mutual Insurance Company, Implement Dealers Mutual Fire Insurance Company, and Lititz Mutual Insurance Company and Implement Dealers Mutual Fire Insurance Company, doing business as The Jefferson Mutuals, Defendants, as fully as the same remain on file and of record in my office as such Clerk in said cause, and in accordance with the Designation of Contents of Record on Appeal filed therein.

In Witness Whereof, I have hereunto set my hand and caused to be affixed the seal of the United States District Court for the Southern District of Alabama, at Mobile, Alabama, this the 25th day of January A. D., 1957.

WILLIAM J. O'CONNOR,
(William J. O'Connor),
Clerk, United States District Court, Southern District of Alabama.

(Seal)

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 667

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

HUGH A. LOCKE,
Frank Nelson Building,
Birmingham, Alabama,
Counsel for Petitioners.

JOSEPH S. MEAD,
MARSHALL H. FITZPATRICK,
Frank Nelson Building,
Birmingham, Alabama,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. Central 1-4477.

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Cases Cited.

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Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665	13
Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 58 Sup. Ct. 860	13

Statute Cited.

Title 28, United States Code, Section 1254 (1)	2
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Textbook Cited.

5 Appleman, Insurance Law and Practice, pp. 554-556	12
5 Appleman, Insurance Law and Practice, pp. 559-561	12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, defendants in the District Court, appellants below, respectfully pray that a writ of certiorari issue to

the United States Court of Appeals for the Fifth Circuit to review the judgment and opinion of that Court entered on October 1st, 1957 (reported at 248 F. 2d 241), affirming the judgment of the United States District Court for the Southern District of Alabama, rendered on October 1st, 1956 (reported at 146 F. Supp. 492). The opinion of the District Court may be found in the copies of the record in the Court below filed herewith, on pages 58-62 thereof. The opinion of the Court of Appeals is appended to this petition.

JURISDICTION.

The Court's jurisdiction is invoked upon the basis of the provisions of Title 28, United States Code, Section 1254 (1), setting forth the Court's power to review judgments of the Court of Appeals by way of writ of certiorari. As shown above, the judgment of the Court of Appeals sought to be reviewed was entered on October 1st, 1957, as appears from its minute entry appearing on page 95 of the certified record filed herewith. The rehearing sought by petitioners was denied by the Court of Appeals on October 31st, 1957, as appears from its minute entry appearing on page 113 of the certified record.

Thus, this petition for certiorari is presented within the time prescribed for applying therefor by Title 28, United States Code, Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented in this cause may be stated as follows:

1. Can one occupying the position of a simple loss payee or appointee of an insured in a policy of fire insurance recover from the insurer where the insured's limited

interest in the property destroyed had been terminated prior to the institution of the suit?

2. Can there be a recovery on a policy of fire insurance where no monetary loss has been caused the insured?

3. Can a Court of Appeals decide an issue which should be controlled by local law directly contrary to the decisions of the highest Court of the State involved?

4. Is it in accord with the accepted and usual course of judicial proceedings for a Court of Appeals to completely ignore applicable state law on a question controlled by state law?

5. Where applicable, controlling state law affords a discharge of a liability, is it in accord with due process of law for a Court of Appeals to ignore such status of the law, and to enter judgment for a substantial amount against the party who seeks to have it invoke such applicable state law in its favor?

STATEMENT OF THE CASE.

This cause is a suit upon a policy of fire insurance issued by petitioners. Respondent, a citizen of the State of Alabama, filed the suit in the Circuit Court of Marengo County, Alabama. Petitioners, citizens of the States of Pennsylvania and North Dakota, respectively, removed the cause to the United States District Court for the Southern District of Alabama on the basis of the diversity of citizenship involved.

Although petitioners asserted several defenses, the only one material here was that respondent, being a simple loss payee of their insured, would be entitled to recover only if the insured could recover, and that since insured's only insurable interest in the property at the time of the

loss was a secondary liability upon a mortgage indebtedness on said property, and since he had been discharged from that secondary liability by respondent herself prior to the institution of this cause, the insured sustained no loss by the fire and could not recover against petitioners, and, therefore, neither could his appointee, the respondent.

The cause was submitted to the District Court without the intervention of a jury upon a stipulation of facts and eleven exhibits of a documentary nature. The stipulation of facts appears in the certified record on pages 41 through 51 and also on 51 through 52. The orginals of the eleven exhibits introduced during this stipulation were certified by the District Court to the Court of Appeals and have by that Court been certified and transmitted to this Court for its consideration in determining this cause.

For the proper understanding of the questions posed by this case, it is perhaps best to consider the rather simple, uncontroverted facts as they unfolded chronologically. The policy sued on was issued on October 2, 1949, covering on the property involved in this litigation in the amount of $5,000.00. As originally issued, the policy insured George H. Jay and legal representatives for a term of five years to the extent of the actual cash value of the property insured at the time of loss, not exceeding, of course, the amount of the policy, "nor in any event for more than the interest of the insured." The policy was the Standard form of policy and contained the usual provision that it was made and accepted subject to all its provisions and stipulations and all provisions and stipulations added thereto. It also contained the following clause:

> "Mortgagee Clause—Loss, if any, on building items shall be payable to: (1) D. F. Jacobs, Demopolis, Alabama, as interest may appear, subject to provisions of the Mortgagee Clause appearing on the reverse side of this form."

The policy was introduced into evidence as Exhibit No. 1 and has been certified to this Court for its examination so that its terms and provisions may be before the Court in their entirety in the consideration of this cause.

There seems to be no doubt that at the time of the issuance of this policy George H. Jay was the owner of the property involved. However, it is to be noted that the parties stipulated that title is assumed in George H. Jay as of March 22, 1952, at a time preceding any conveyance of the property in question out of him.

On October 22, 1949, George H. Jay and wife, Marjorie Jay, executed a mortgage on the property involved to one H. A. Feibelman in the amount of $7,000.00. This mortgage was introduced into evidence as Exhibit No. 8 and is before this Honorable Court.

On November 8, 1949, the following endorsement was added to the policy in suit:

> "It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy.
>
> Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals, issued at its Newbern, Alabama, Agency.
>
> Dated November 8, 1949.
>
> Turpin Vise,
> Agent."

Some time during the year 1951 H. A. Feibelman died, testate. His last will and testament was probated in the Probate Court of Marengo County, Alabama, on December 28, 1951. A certified copy of his said will and the certifi-

cate of probate thereto was introduced into evidence as Exhibit No. 3. It is to be noted that the mortgage indebtedness in question was bequeathed to certain named co-trustees for certain specified trust uses. The same parties designated as the trustees in said will were also designated as the executors thereof.

From an examination of the endorsements to Exhibit No. 1 it will be noted that by endorsement dated March 1st, 1952, the name of the insured was changed from George H. Jay to Elmer Russell Wood. By deed dated March 22nd, 1952, and introduced into evidence as Exhibit No. 2, the property involved was conveyed by George H. Jay and wife, Marjorie A. Jay, to Elmer Russell Wood for a recited consideration of $12,500.00 and the assumption of the $7,000.00 mortgage which Jay had executed to Feibelman on October 22nd, 1949.

On February 20, 1953, pursuant to a decree rendered by the Circuit Court of Marengo County, Alabama, In Equity, in the matter of the final settlement of the estate of H. A. Feibelman, the co-executors under Feibelman's will transferred the mortgage indebtedness executed by George H. Jay to Feibelman on October 3, 1949, and assumed by Elmer Russell Wood on March 22, 1952, to the co-trustees named in the will of said decedent. Said conveyance was introduced into evidence as Exhibit No. 4.

This brings us down to the date of the fire, September 22nd, 1953. At 6:30 P. M. on that date (or fifteen minutes earlier or later) title to the insured property was transferred by warranty deed of that date, executed by Elmer Russell Wood and wife, Lottie M. Wood, to W. E. Curb. The delivery of the deed in question took place in the office of Attorney Thomas Seay in Marion, Alabama. The deed in question was introduced into evidence as Exhibit No. 5, and recited a consideration of $600 plus the assumption by

the grantee of the mortgage for $7,000.00 theretofore executed by George H. Jay to H. A. Feibelman, and previously assumed by the grantor in the deed, Elmer Russell Wood.

Approximately three and one-half hours after the delivery of this deed, the subject property was damaged to the extent of $4,000.00 by fire of undetermined origin. It was stipulated that this fire had its inception at 10:10 o'clock P. M. (or fifteen minutes earlier or later).

It was stipulated that after the transfer of the property from Wood to Curb, and after the property had been damaged or destroyed by fire, both of said events occurring as aforesaid on September 22nd, 1953, a request was received by the agent of appellants to transfer the policy sued on from Elmer Russell Wood to W. E. Curb, but, of course, such a transfer was never made (and for that matter, it is doubtful that it could have been effective as a matter of law, if made).

On March 11, 1955, there occurred a multi-party transaction of tremendous import in this litigation. As shown by Exhibit No. 11, W. E. Curb conveyed the property in question to John C. Barnes, Jr. (a three-fourths undivided interest), and to his mother, Margaret Coles Barnes (an undivided one-fourth interest). The deed recites a consideration of $100 in cash, the execution of a purchase money mortgage to the grantor in the amount of $6,500.00, and an assumption of the balance due on the mortgage executed by George H. Jay to H. A. Feibelman, which mortgage subsequent to its execution had in turn been assumed by Elmer Russell Wood, and then by the grantor in the present deed, W. E. Curb.

Exhibit 10, executed on the same day, March 11, 1955, is the purchase money mortgage forming part of the consideration for the deed from Curb to the Barnes. It is

noted that it is in the amount of $6,500.00, as stated in the deed. It is also particularly noteworthy that the plaintiff in this case, Martha Barnes, joined in the execution of the mortgage as one of the principals bound thereby, and that said mortgage contains the usual warranties of title to the grantee on the part of all the grantors therein, including the plaintiff in this case.

Also, on the same date of March 11, 1955, we have the execution of Exhibit No. 9, by the plaintiff in this case. It is this very important document which appellants claim has unquestionably established their non-liability in this case. This document recites the assumption of the Jay-Feibelman mortgage by the plaintiff's husband and mother-in-law on its date of execution, and further declares that the plaintiff was in the process of purchasing the aforesaid Jay-Feibelman mortgage. It goes on to expressly subordinate said Jay-Feibelman mortgage to the purchase money mortgage executed to Curb and states "that I do hereby forever release and discharge said W. E. Curb from any and all liability under the aforesaid Jay-Feibelman mortgage." It will be noted that none of the other persons secondarily liable on the Jay-Feibelman mortgage, that is, Elmer Russell Wood, or George H. Jay, were parties to this instrument nor does it appear anywhere else in the facts that they were ever notified or consulted regarding the execution of this release, nor ever consented thereto, nor ever agreed that their liability on the mortgage would remain unchanged thereby.

On April 18, 1955, as appears from Exhibit No. 6, the aforesaid Jay-Feibelman mortgage was transferred to the plaintiff in this case by the co-trustees of H. A. Feibelman, for the recited consideration of $4,545.09. Afterwards, on May 10, 1955, as appears by Exhibit No. 7, the co-trustees of the Feibelman estate specifically transferred to the plaintiff all of their rights and claim under the insurance

policy in suit. Thereafter, on September 16, 1955, the respondent here, plaintiff in the trial court, instituted the present suit in the Circuit Court of Marengo County, Alabama, as appears from the Clerk's endorsement on the Summons issued by the Court appearing on page 5 of the certified record.

On October 1, 1956, the District Court rendered judgment in favor of the respondent here, as is set forth on page 63 of the record. As appears from the report of the District Court's decision at 146 F. Supp. 492, also appearing on pages 58 to 62 of the record, the District Court based its judgment on the theory that respondent was protected by the provisions of the New York standard mortgagee clause contained in the policy sued on.

Petitioners filed a motion for modification of the finding of the District Court, which is set out in the record on pages 64 through 68. It will be noted that Ground 11 of that motion specifically raises the point of the non-liability of petitioners on the policy because of the discharge of their insured from liability on the mortgage held by respondent. The District Court overruled this motion on December 12th, 1956, following which the cause was duly appealed to the Court of Appeals.

As will be noted from an examination of the opinion of the Court of Appeals appended hereto and reported at 248 F. 2d 41, that Court on October 1st, 1957, affirmed the holding of the District Court by majority decision. It will be noted that the Court of Appeals expressly repudiated the theory of the District Court, that respondent was one protected under the provisions of the New York standard mortgagee clause, but, nevertheless, affirmed, without apparent consideration by the majority of petitioners' primary defense, so wholeheartedly championed by the dissenter, Judge Jones.

Petition for rehearing and brief in support thereof were filed in the Court of Appeals by petitioners and are contained in the certified record on pages 96 through 112 thereof. It will be noted from this petition and brief that petitioners again pressed the point of their non-liability under applicable Alabama law upon the Court of Appeals, but without result, as the Court denied the rehearing petition on October 31st, 1957, with Judge Jones again dissenting.

ARGUMENT.

It appears to petitioners that in the instant case the Fifth Circuit Court of Appeals is manifesting an inclination to return to the days prior to the decision of **Erie Railroad Company v. Tompkins**, 58 Sup. Ct. 817, 304 U. S. 64 (1938), and to apply the unconstitutional, discredited "general law" theory of the **Swift v. Tyson** era.

It is shown by the stipulated facts in this cause, and found by the Court of Appeals, that at the time of the fire complained of, the interest of the insured in the policy was merely for his protection as one secondarily liable upon a mortgage indebtedness on the insured property. Prior to the institution of this suit, respondent had released him from any such liability on the mortgage; he, therefore, faced no possibility of any loss on account of the fire.

Alabama law is clear to the effect that in cases involving insurance policies, as well as other types of written obligations "A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is thus fixed, it may cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect." **Aetna Insurance Co. v. Baldwin County Building & Loan Association**, 163 So. 604. It is also clear that Alabama law is explicit to the effect that a contract of insurance is a contract of indemnity only. **American Insurance Co. v. Porter**, 144 So. 129.

The majority opinion of the Court of Appeals fails to follow these explicit Alabama holdings. It is to be noted, however, that the dissenter, Judge Jones, would hold in conformity with the Alabama law. It strikes petitioners as quite strange that a majority of the Court should not even consider the issue—nor even mention it in their

opinion—which the minority member of the Court holds should be determinative of the whole cause.

Of course, the District Court did not even come to a consideration of this issue, for it decided the case upon an entirely different theory. It held that the respondent was protected under the provisions of the New York standard mortgagee clause. Under the law, the effect of this clause would be to make a separate contract between the insurer and the mortgagee, so that a defense against the named insured would have no effect upon the claim of the mortgagee. 5 Appleman, Insurance Law and Practice, pp. 559-561. However, this holding by the District Court was erroneous, as was correctly held by the Court of Appeals. Respondent's interests were derived through a simple loss payee clause, which made her a mere appointee of the named insured to receive whatever he might have been entitled to under the policy, to the extent of her interest, making her subject to any defenses which the insurer might have had against the named insured. 5 Appleman, Insurance Law and Practice, pp. 554-556. But with this determination, the majority of the Court of Appeals stopped. They did not go on to consider the stipulated facts and decide whether there had been a release of liability prior to the institution of suit, as contended by petitioners and as held by the dissenting judge. They did not consider the Alabama decisions cited by petitioners in their brief and find, as did the dissenting judge, that under the Alabama cases, matured rights under an insurance policy could be terminated by circumstances having that legal effect. They ignored the problem and, citing cases from other jurisdictions only, which could have no more than academic interest, they seem to hold as a matter of "general law" that when property, the subject of a policy of insurance, is burned, an insurance company must pay someone, even if the person insured sustains no loss. Petitioners cannot believe that the majority of the Court of Appeals did not

even perceive the question present for their decision after they had reached the result that the District Court's theory was erroneous, for petitioners certainly pointed the matter out to the Court of Appeals in brief. In this regard, petitioners are appending hereto pages 40 through 54 of their brief before the Court of Appeals.

Petitioners earnestly believe that there are special and important reasons existing for the grant of the writ of certiorari prayed for. The effect of the decision would be to deprive petitioners of a fairly substantial amount of money in a case, which if left in the Courts of the State of Alabama, would probably have been decided in petitioners' favor. But beyond the mere question of money, it restores the old era of uncertainty, and of discrimination, and of inequality before the law, existing in diversity of citizenship cases prior to the decision of **Erie Railroad Co. v. Tompkins**, supra. This Court has many times determined that certiorari will be granted where questions of local law are thus determined by the Courts of Appeals in a way apparently in conflict with the applicable state law.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 58 Sup. Ct. 860;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Aetna Insurance Co. v. United Fruit Co., 304 U. S. 430, 58 Sup. Ct. 959;

Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665;

Bernhardt v. Polygraphic Company of America, Inc., 350 U. S. 198, 76 Sup. Ct. 273.

Then, too, your petitioners humbly believe that the accepted, proper and usual course of judicial proceedings would require that, at the very least, an appellate court give consideration in its opinion to an issue of such significance and import that a minority member of the Court finds it controlling. In this trying age of external peril

and growing indications of internal decadence, it seems especially important to petitioners that there be emphasized and brought home whenever possible, that this is indeed a nation where the law reigns supreme, and not the capricious rulings of man. Petitioners earnestly believe that this case affords such an opportunity.

Wherefore, petitioners pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Court of Appeals on the case numbered 16466, and entitled on its docket—Lititz Mutual Insurance Company et al. Appellants, v. Martha Barnes, Appellee—to the end that this case may be reviewed and determined by this Court; that the judgment of the said Court of Appeals for the Fifth Circuit be reversed and a judgment here rendered in favor of petitioners; that petitioners be granted such other and further relief as to this Honorable Court may seem meet and proper.

Respectfully submitted,

HUGH A. LOCKE,
Counsel of Record for Petitioners.

JOSEPH S. MEAD,
MARSHALL H. FITZPATRICK,
Of Counsel.

APPENDIX I.

OPINION OF COURT OF APPEALS.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 16466.

Lititz Mutual Insurance Company, et al.,
Appellants,

versus

Martha Barnes,
Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

(October 1, 1957.)

Before Rives, Jones and Brown, Circuit Judges.

Rives, Circuit Judge: This appeal is from a judgment against the insurer in a fire insurance policy for the amount of $4,000.00 plus 6% interest from September 22, 1953, the date of the fire. The policy was issued on October 3, 1949, for a term of five years to October 3, 1954. To

an amount not exceeding $5,000.00. it insured against loss by fire George H. Jay to the extent of the actual cash value at the time of loss, "nor in any event for more than the interest of the insured" in a one story frame building known as 22 North Washington Street, Demopolis, Alabama. The provisions of the policy relating to the interest of a mortgagee are copied in the margin.[1]

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[1] "*Mortgage interests and obligations.* If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

"If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing."

A "Mercantile Form" attached to the policy contained on one side thereof the following:

"*Mortgagee Clause*—Loss, if any on building items, shall be payable to: (1) D. F. Jacobs, Demopolis, Alabama .....; (2) ....., as interest may appear, subject to provisions of the Mortgagee Clause appearing on the reverse side of this form."

On the reverse side of the form appeared the following:

"*Mortgagee Clause (This entire clause is void unless name of mortgagee or trustee is inserted on reverse side in space provided)* —Loss, if any on building items under this policy, shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, That in case the mortgagor or owner shall neglect to pay any premium due,

On October 22, 1949, the insured Jay executed a mortgage on the property to H. A. Feibelman in the amount of $7,000.00. The property was warranted "free of and from all encumbrances" and presumably the mortgage theretofore held by D. F. Jacobs was paid off for nothing further is heard of that mortgage. On November 8, 1949, the following endorsement was added to the policy:

"Loss Payable.

"It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy.

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under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided also, That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.

"This Company reserves the right to cancel this policy at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

"Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interests, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.

"The above Mortgagee Clause DOES NOT apply to personal property."

Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals issued at its

Name of Insurance Company

Newbern, Alabama Agency.
City or Town State

"Dated November 8, 1949.

Turpin Vise Agent.
Turpin Vise"

In March, 1952, the property was conveyed by the insured Jay to Elmer Russell Wood for a consideration which included the assumption of the Feibelman mortgage. By endorsement the name of the insured was changed from Jay to Wood. At 6:30 P. M. on September 22, 1953, the property was conveyed by Wood to W. E. Curb who assumed the Feibelman mortgage. The name of the insured had not been changed from Wood to Curb when, approximately three and one-half hours after the delivery of this deed, the property was damaged to the extent of $4,000.00 by fire of undetermined origin.

The company received due notice of the fire and demands for payment from various persons, including the appellee, but the company has made no payment under the policy to any person.

On March 11, 1955, two and one-half years after the fire, W. E. Curb conveyed the property to John C. Barnes, Jr., and his mother, Margaret Cole Barnes. The deed recites a consideration of $100.00 in cash, the assumption of the balance due on the Feibelman mortgage, and the execution of a purchase money mortgage to Curb for $6,500.00. The purchase money mortgage was duly executed by the grantees joined by the appellee, Martha Barnes, the wife of John C. Barnes, Jr. At the same time, Martha Barnes executed another instrument in which she recited that she was in the process of purchasing the Feibelman mortgage,

subordinated the Feibelman mortgage to the purchase money mortgage, and released and discharged Curb from any and all liability under the Feibelman mortgage. Thereafter for a recited consideration of $4,545.09, the Feibelman mortgage was formally transferred to Martha Barnes. The co-trustees of the estate of Feibelman, then deceased, transferred to her also all of their rights and claim under the insurance policy in suit.

The facts were stipulated and the case submitted to the district court without a jury. That court entered judgment for the plaintiff upon the theory that she was "entitled to the full protection of the New York Standard Mortgagee Clause." It further held that, "Insurers cannot have subrogation against property of persons who are not parties to the cause."

We do not agree with the theory of the district court. The appellee is a successor in interest to H. A. Feibelman[2] who was named in a simple loss payable clause of such importance that its pertinent part is here repeated:

> "It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy."

Clearly, appellee's interest is limited to "any loss that may be ascertained and proven to be due the insured under this policy." Any such loss is payable to the appellee as her interest may appear. Appellee relies upon the words "subject, nevertheless, to all conditions of the policy," arguing that one of the conditions of the policy was the

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[2] In so holding we have not overlooked appellants' contention that the transfer of the mortgage "and all collateral pertaining thereto" by Feibelman's executors to themselves as co-trustees did not include matured rights of action not specifically assigned. See Thornton v. Strauss, 79 Ala. 164. The answer is that the right of action had not matured. The transfer was on February 20, 1953, while the loss did not occur until the following September 22.

New York Standard mortgagee clause under which D. F. Jacobs had been protected at the time of the issuance of the policy. By its own terms, however, that clause was void unless Jacobs' name had been inserted, and we can find no warrant for holding that the designation of Feibelman under a simple loss payable clause had the effect of substituting him for Jacobs in the New York Standard clause. The appellee was in the position of one who was an appointee of the insured to receive the proceeds of the policy to which the insured might be entitled, to the extent of the appointee's interest.[3]

A few hours before the fire, the insured Wood had parted with the ownership of the property. He remained liable, however, though as between himself and Curb, secondarily liable, for the payment of the Feibelman mortgage. Appellants concede, as they must, that Wood still had an insurable interest for protection against such liability. **Union Insurance Society of Canton v. Sudduth,** 212 Ala. 649, 103 So. 845, 847 (1925).

The limitation in the insuring clause of the policy, "nor in any event for more than the interest of the insured," makes it necessary to determine the extent of the insurable interest remaining in Wood after he had conveyed title to the property. We are of the opinion that that interest extended to the full amount of the mortgage debt for which Wood remained liable. As between himself and the insurance company, Wood did not have to speculate on whether the mortgage debt would be paid by Curb, nor on whether it could be collected by foreclosure on the prop-

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[3] 5 Appleman, Insurance Law and Practice, § 3401, pp. 554-556, 559-561; Home Loan & Finance Co. v. Fireman's Fund Ins. Co., 129 So. 470 (Ala. 1930); Hartford Fire Ins. Co. v. Aaron, 147 So. 628 (Ala. 1933); Heyl v. Aetna Ins. Co., 38 So. 118, 144 Ala. 549 (1905); Longfellow v. National Fire Ins. Co., 170 Pac. 813 (Kansas); Green v. Fidelity-Phenix Fire Ins. Co., 64 S. E. 2d 162, 233 N. C. 321 (1951); Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497 (8th Cir. 1905); Brecht v. Law, Union & Crown Ins. Co., 160 Fed. 399 (9th Cir. 1908).

erty remaining after the fire. Under the policy, he had a right to look to the insurance as a primary source of protection against his liability. **Strong v. Manufacturers' Ins. Co.**, 10 Pickering 40, 20 American Decisions 507; **Buck v. Phoenix Ins. Co.**, 76 Me. 586 (1885); **Jenks v. Liverpool, London & Globe Ins. Co.**, 92 N. E. 998 (1910); 6 Appleman, Insurance Law and Practice, § 3868, p. 230; Couchs' Cyclopedia of Insurance Law, § 407, pp. 1180-1181; Jones, Mortgages, 4th ed., § 397, p. 301; 44 C. J. S., Insurance, § 187, pp. 883-884.

We do not mean to hold that Wood could have collected the insurance without applying it to the mortgage debt. That was not attempted. What we do hold is that, under the policy, Wood was clearly entitled to protection against his liability for the mortgage debt.

Upon the occurrence of the fire, the contract immediately ripened into one simply for the payment of money. **Union Insurance Society of Canton v. Sudduth**, supra. Feibelman's interest was in the same amount as that of Wood, and under the loss payable clause, the entire loss to the extent of the mortgage debt became payable to Feibelman **Capital City Insurance Co. v. Jones**, 128 Ala. 361, 30 So. 674 (1900).

Appellant insists, however, that, upon payment of the mortgage debt, it would have had a right to be subrogated to the mortgagee's rights of recovery, and that the appellee prejudiced those rights of subrogation when she released Curb from liability and subordinated the Feibelman mortgage to the purchase money mortgage executed by her husband and his mother to Curb. The contractual rights of subrogation contained in the policy were applicable only to a loss payable to a "designated mortgagee" under the mortgagee clause attached to the policy. The subsequent "loss payable" endorsement contained no mention of subrogation. The insurer has then no contractual right of subrogation.

It urges that, upon general equitable principles, if it pays Wood's debt, it should stand in Wood's shoes and have the right to pursue Wood's remedies against Curb and against the property. If Wood had breached the contract, some rights of subrogation might have accrued to his insurer, but we have been cited to no case, and we believe that none can be found, holding that an insurer which takes advantage of the defense that the fire occurred within a few hours after the insured had conveyed the property, and before, in the ordinary course of business, the name of the insured had been changed, has any right of equitable subrogation against the property or against its new owner. In our opinion, it cannot reasonably be claimed that such a result would be just and equitable. We hold, therefore, that, under the facts and circumstances of this case, the insurer never had any equitable right of subrogation.

Finally, the appellant urges that the district court erred in awarding interest from the date of fire. The policy contained the usual provisions as to when loss was payable, namely "sixty days after proof of loss," etc. There was no express stipulation concerning the proofs of loss or as to any specific denial of liability. Failure to furnish proofs of loss was not urged as a defense. As of the date of the trial, more than three years after the fire, it was stipulated that:

> "The company received due notice of the fire.
>
> "The policy has not been paid to any person, though demands have been made on us to pay W. E. Curb, Elmer Russell Wood, the co-trustees under the will of Harry A. Feibelman, and the plaintiff in this case, Mrs. Martha Barnes. To this point, we have made no payment to any person."

Under Rule 52 (a), Federal Rules of Civil Procedure, we think that it was not clearly erroneous for the district court to infer that the company had denied liability from

the beginning, and had waived the requirements of the policy authorizing it to delay payment awaiting proofs of loss. **St. Paul Fire & M. Ins. Co. v. Garza County W. & M. Ass'n,** 93 F. 2d 590, 592 (5th Cir. 1937); 46 C. J. S., Insurance, § 1393, p. 698.

The judgment is therefore affirmed.

Jones, Circuit Judge, Dissenting:

The insurance policy was for a five year term commencing October 3, 1949. The insured was Jay. The coverage was $4,000. The policy contained an endorsement providing that any loss due the insured would be payable to Feibelman who held a mortgage on the property. On March 22, 1952, Jay conveyed to Wood who assumed payment of the mortgage debt. By endorsement Wood became the insured under the policy. By deed dated September 22, 1953, Wood conveyed the premises to Curb who assumed and agreed to pay the mortgage debt. Wood remained the insured named in the policy. Curb did not become an insured. On the same day, September 22, 1953, a fire occurred resulting in a loss exceeding the amount of the policy. On March 11, 1955, Curb gave a deed of the premises to John C. Barnes, Jr., and Margaret Cole Barnes, his mother. They assumed the indebtedness of the Feibelman mortgage. John C. Barnes, Jr., his wife Martha Barnes, the plaintiff-appellee, and Margaret Cole Barnes gave Curb a purchase money mortgage for $6,500. This mortgage recited that all three of the mortgagors were indebted to and had given their promissory notes to Curb. On the same day, March 11, 1955, Martha gave to Curb an instrument in which it was recited that she was in the process of purchasing the Feibelman mortgage and by which it was provided that she subordinated the Feibelman mortgage to the mortgage given by the Barnes to Curb and releasing Curb from liability on the Feibelman mortgage. Feibelman died. His executors, by an instru-

ment dated February 24, 1953, reciting the direction of a decree of the Circuit Court of Marengo County, Alabama, transferred the mortgage of Jay to Feibelman, with other mortgages, to Feibelman's testamentary trustees. On April 18, 1955, the trustees of Feibelman executed a transfer of the Feibelman mortgage to Martha Barnes. It was stated that a principal balance of $4,420 was unpaid. On May 10, 1955, the trustees of Feibelman released quit-claimed, transferred, assigned and conveyed to Martha Barnes all of their right, title, interest and claim in and to the insurance policy. If they had what they purported to assign the record does not show it.

After Wood parted with title to the insured premises he had, the majority hold, an insurable interest by reason of his liability on the mortgage debt. But as between Wood, the insured, and Curb, his grantee, the liability of the latter was primary, and that of Curb was secondary and contingent. When Martha Barnes subordinated the Feibelman mortgage to the mortgage which she, with her husband and his mother, gave to Curb, and released Curb from the obligation which he had undertaken when he purchased from Wood, Wood was also released and upon becoming released his insurable interest was gone. Martha Barnes as assignee of the Feibelman interest in the policy could have no greater rights than Wood and the Wood interest was extinguished along with the liability upon which the interest was dependent.

The majority would not hold that Wood could have collected the insurance without applying it to the mortgage debt. But they would and do hold that the proceeds become payable after the mortgage debt has, as to Wood, become extinguished.

Insurance is an agreement to indemnify against loss. Feibelman sustained no loss, Wood sustained no loss and yet Martha Barnes recovers. Regretfully and deferentially I dissent.

APPENDIX II.

EXTRACT FROM PETITIONERS' BRIEF BEFORE COURT OF APPEALS.

Specification of Error No. 2.

Inasmuch as the appellee in this case had no interest in the policy sued on other than a mere appointment to receive to the extent of her interest, the proceeds of the policy to which the insured was entitled, as is demonstrated in the argument on the last preceding Specification of Error, it would thus seem logical to appelants that a determination of whether the insured named in the policy was entitled to any recovery thereunder at the time this suit was instituted would be the pertinent inquiry. It was appellants' contention in the court below that there was no such liability to the insured under the policy at the time of the institution of this suit.

It is undisputed in the facts that prior to the occurrence of the fire, the insured had completely divested himself of any title or ownership to the insured property. Just prior to the fire his only interest in the preservation of the property was his right to be exonerated out of it to the extent of his secondary liability on the Jay-Feibelman mortgage. However, six months prior to the time that this suit was instituted, even this last vestige of the insured's interest in the insured property was completely and efficaciously obliterated.

The instant suit was filed on September 10, 1955, but on March 11, 1955, appellee had released the insured named in the policy from his secondary liability on the Jay-Feibelman mortgage by the execution of the subordination agreement and release which is Exhibit No. 9 before this Honorable Court. With the execution and delivery of this instrument, Elmer Russell Wood's insurable interest in this

property went out the window; after that date any liability under this policy to him was as effectually terminated as if the policy had never existed. Let us examine the controlling principles of law as they bear upon the undisputed facts.

A contract of fire insurance is a contract of indemnity only. An insured may recover only to the extent of his monetary loss—nothing more. This fundamental doctrine finds expression in **Appleman on Insurance, Vol. 4, § 2107**, page 10:

> "A contract of fire insurance is a personal contract for indemnity for the insurable interest possessed by the insured at the time of the issuance of the policy, and also at the time of loss. The insured's liability is measured thereby. All such contracts of property insurance, whether for fire, marine, or other types are considered contracts of indemnity, intended solely to indemnify the insured for his actual monetary loss by the occurrence of the disaster. Unless the insured has sustained an actual loss, the insurer has no liability."

It is basic in insurance law that an insured must have an insurable interest in the property covered for the policy to be valid and collectible. **Girard Fire & Marine Ins. Co. v. Gunn**, 130 So. 180, 221 Ala. 654; **American Equitable Assurance Co. v. Powderly Coal & Lumber Co.**, 142 So. 37, 225 Ala. 208. What was the insurable interest of the insured in the instant policy at the time this suit was instituted? Absolutely none! With what monetary loss was he faced at the time of institution of this suit? Again, absolutely none!

Wood had parted with ownership of the property prior to the fire. When he sold this property and its loss by fire fell upon another and not upon him, the only possible interest he could have had in the property was based upon his liability as a surety on the indebtedness secured by

the Jay-Feibelman mortgage. Therefore, the policy insured him only in that capacity at the time of the fire. It did not and could not insure him as owner of the property because he was not the owner of it, and the loss by fire did not fall upon him but upon his grantee. In the case of Union Insurance Society of Canton v. Suddeth, 212 Ala. 649, 103 So. 845, there was a somewhat similar insurable interest. In that case, the plaintiff, a mortgagee and conditional vendor of automobile trucks, endorsed the purchase money notes and hypothecated them to a bank. The contention was made that the mortgagee had parted with all insurable interest in the property. The Alabama Supreme Court, Mr. Justice Bouldin writing, said:

> "However, a mortgagee who endorsed the notes evidencing the secured debt, still has an insurable interest by way of protection against his liability as endorser and may hold the policy for such purpose."

So, it must be admitted that at the time of the fire Elmer Russell Wood did have this limited insurable interest, and, in the words of Justice Bouldin, he could at that time hold the policy "by way of protection against his liability as endorser."

But what about subsequent developments? What about the situation existing at the time this suit was filed? What about the effect of the execution by this appellee of the instrument before this Honorable Court as Exhibit No. 9 to the facts stipulated between the parties?

There is no dissension among the authorities as to the effect of such an action as taken by this appellee when she released W. E. Curb from any liability on the Jay-Feibelman mortgage. **American Jurisprudence, Volume 50, § 109,** page 976, states:

> "A surety is entitled to be subrogated to the benefit of all the securities and means of payment under the

creditor's control, and so, in the absence of assent, waiver, or estoppel, he is generally released by any act of the creditor which deprives him of such right. The creditor must for a surety's benefit apply to his debt all moneys and securities of the principal within his control which he has the right to apply, and if he voluntarily surrenders or releases the same, the surety is discharged pro tanto."

The proposition is thus stated in **50 Corpus Juris, Principal & Surety, § 259**, page 158:

"A creditor or obligee, who has securities or funds in his possession applicable to the payment of the secured debt, is under the obligation to the surety to use ordinary care and prudence to preserve such securities or funds for the surety's benefit, and the surety is discharged from further liability either entirely or pro tanto if the creditor, in dereliction of his duty, relinquishes or loses them by his wilful acts or through his negligence, or if he consents to a material alteration of the security to the prejudice of the surety, or by any act deprives the surety of the right of subrogation. Relinquishment operates as a discharge of the surety without regard to the existence of collusion or time when the creditor received the security held by him, or whether the surety has knowledge thereof, or whether the principal lacked capacity to enter into the contract."

It has been held that a mortgagee may not even extend the time for payment to an assumptor of the mortgage, without the mortgagor's consent, without releasing the mortgagor from liability for the debt. In **First National Bank of Birmingham v. Hendrix**, 241 Ala. 675, 4 So. 2d 407, in an opinion written by Chief Justice Livingston of the Alabama Supreme Court in 1941, this statement is found:

"When the mortgagee accepts the relationship thus created, he cannot extend the time of payment without the mortgagor's consent without releasing the mortgagor from liability for the debt."

At the time of the transaction on March 11, 1955, whereby W. E. Curb conveyed the insured property to the Barnes, the purchase money mortgage was executed by the Barnes, joined by the appellee, to Curb, and the appellee executed the instrument releasing Curb from any liability on the Jay-Feibelman mortgage, the order of liability on said mortgage was, first, W. E. Curb; second, Elmer Russell Wood; and third, the original mortgagor, George H. Jay. Insofar as Wood was concerned, W. E. Curb was the primary debtor at that time. There is no principle better settled than that a discharge of the principal debtor from liability necessarily discharges the sureties or endorsers. This proposition is not controverted and cannot be. **Scott v. McGriff**, 132 So. 177.

To cite all the authorities to the effect that the discharge by the creditor of one primarily liable on an indebtedness also amounts to a discharge in law of those secondarily liable, would unduly prolong this brief. Suffice it to say, that the principle is well established in the law of every jurisdiction, so far as can be determined by appellants. It has also been written into the statutory law of many states. For instance, in the State of Alabama there are a number of statutes giving rights to sureties which are entirely inconsistent with continued liability on the surety, following a discharge by the creditor of one primarily liable for the debt. **Alabama Code of 1940, Title 9, §§ 78, 79, 80, 84, 87 and 89.** These statutes are set out in full in the appendix to this brief. Section 89 gives one secondarily liable the right to require the creditor to sue the principal debtor, and upon failure of the creditor to do so, specifically provides for his discharge. Where a creditor has disabled herself from suing W. E. Curb by her release of him from

the mortgage indebtedness, it would be a complete non sequitur to attempt to maintain that this statutory provision would not result in a release to the surety, Elmer Russell Wood.

But, says appellee in this case, her rights to recover on this policy were fixed as of the time of the fire loss, and since at that time the insured named in the policy, Elmer Russell Wood, had an insurable interest in the insured property, slight though it may have been, appellee can recover in this suit, despite the fact that prior to the institution thereof she may have released Elmer Russell Wood from liability on the Jay-Feibelman mortgage and thus have destroyed any interest he may have had under the policy. Isn't it a foregone conclusion that the occurrence of the casualty insured against by a policy of insurance fixes and determines the rights of parties thereunder?

Anticipating this position of appellee, appellants answer that as in any other branch of law, rights under policies of insurance may be defeated and completely dissolved by developments subsequent to their creation. There could be no better illustration of this than the case of **Aetna Ins. Co. v. Baldwin County Building & Loan Assn.**, 163 So. 604. In the words of the opinion in that case:

> "A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is thus fixed it may cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect."

The contentions and relationships of the parties in the **Aetna Case** are in so many respects analogous to those of the parties in the instant case, and appellants so earnestly believe that the principle announced in it should be controlling in this case, that they desire to quote at some length from the opinion rendered therein:

"Plaintiff had a mortgage on the property burned, a dwelling house, and the lot on which it was located. The mortgagor paid the premium on the policy issued to her, and had attached to it the New York standard mortgage clause, by which, among other provisions, the loss was payable to plaintiff as mortgagee, as interest may appear, not to be invalidated by any act or neglect of the mortgagor, nor by foreclosure sale of the property nor any change in title or ownership. The house then burned and thereafter plaintiff, the mortgagee, duly foreclosed its mortgage and became the purchaser of the property for the full amount due on the mortgage debt.

"The question here is whether plaintiff was shown to have a right to recover the amount of the loss thus insured, continuing up to the time of the beginning of the suit, or whether his right terminated by the foreclosure sale in which the plaintiff was the purchaser at the full amount of the debt.

* * * * * * *

"The provision in the mortgage clause by which the policy shall not be invalidated as to him by the foreclosure does not refer to a forfeiture of his right after the loss occurred, but to the status existing at the time of the loss. The stipulation is that the insurance shall not be invalidated by such foreclosure; not that thereby the mortgagee may not lose his right to collect the loss by a foreclosure thereafter occurring, and occasioned by his status thus created, upon a consideration of established principles. His interest in the claim for the loss must exist not only at the time of the loss, and that is not diminished by a foreclosure which may have occurred theretofore, but it must also exist at the time of the suit and judgment. A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is fixed it may

cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect.

"As we view the status of the parties, it is this: When and immediately after the fire occurred plaintiff was a creditor of Mary Martin in the sum of approximately $1,300. Plaintiff had security for that debt consisting of a mortgage on property and a claim for the loss on the insurance policy. But in no event, and from those or other sources, was he due to collect more than his mortgage debt. He could elect what course to pursue to collect his debt, or pursue them all at the same time. Enforce some or all of his collateral and sue the debtor on his personal liability. If the debtor paid him by a voluntary act, all his rights and remedies immediately terminated, and he could not proceed further to enforce any feature of his security. While he had a claim fixed by the fire loss, it was only as security, and it could and would have terminated by such voluntary payment. No one will contend that a creditor may sue on a collateral note after the debt is paid for which he holds it as collateral, though it became due and liability on it was certain and fixed before the principal debt was paid. A debt is as effectually paid whether by the voluntary act of the debtor, or by compulsory proceedings of any sort which have that legal effect. When so, all rights as a creditor immediately terminate. The further rights of the parties will then depend upon the status created by the incidents which terminate the relation of debtor and creditor. A new relation then begins, controlled by its own terms. Unless by such arrangement the former creditor reserves the ownership or the right to collect the collateral which he held when a creditor, that right terminates with the relation to which it was but an incident.

"It is a fixed principle that when a mortgagee forecloses his mortgage, and at the sale the property

brings, and he collects the full amount of his debt, he is no longer a creditor, but his debt is paid. This is so when he buys at the sale, with due authority, bidding the full amount of his debt. He is then the owner of the property, and not a creditor. There is in the former owner only a statutory right, which is not a property ownership. He has collected his debt as effectually as if another had bought the property and paid him the full amount as purchase money, or if the debtor had paid him in cash of his own accord."

The case of **Aetna Ins. Co. v. Koonce**, 233 Ala. 265, 171 So. 269, is another case demonstrating that after a loss under a policy of insurance the amount recoverable by a mortgagee may be changed by circumstances.

"The amount payable to mortgagor and mortgagee, respectively, changes with every monthly payment on the mortgage debt. All this is in contemplation when the policy is issued, is part of the contractual obligation arising from the transaction."

New Hampshire Fire Ins. Co. v. Curtis, 85 So. 2d 441, is another case holding that the rights of parties under a policy of insurance are subject to change and alteration after a loss has occur ed under the policy.

"The evidence shows that the accident occurred on November 22, 1953, and that the acceptance corporation repossessed the wreckage or salvage on February 3, 1954, which was before the insurance company made any adjustment of the loss or paid the acceptance corporation anything in respect to it. This adjustment was made on April 27, 1954. The salvage was sold by the acceptance corporation for $1,800. So that if, on April 27, 1954, the plaintiff was not indebted to the acceptance corporation in any sum, the entire amount of liability for the loss was payable to plaintiff. It is not important that the repossession occurred subsequent

to the wreck. The rights of plaintiff and of the acceptance corporation, respectively, were but an apportionment of the insurer's liability and that apportionment could be altered by a change of circumstances at any time before a settlement was made with the acceptance corporation. Aetna Ins. Co. v. Koonce, supra."

There is nothing strange or unusual about this concept that rights under policies of insurance may be abridged, or even completely lost after a loss has occurred. In every branch of law there could be cited examples of rights being materially altered or even lost after they have come into being. Where an indebtedness under any form of contract has been discharged after it matures, there existed during the interval following its maturation and before the discharge of the indebtedness, a period during which the creditor was due a liability from the debtor which he could have enforced in an action at law; but following the discharge of the indebtedness, whether it be by release, by accord and satisfaction, by payment from a stranger to the obligation, or from whatever other cause, the creditor's right against the debtor has been altered—it has been dissolved. That is exactly the situation which we have in this case.

Just as was the case with the mortgagee in the **Aetna Ins. Co. v. Baldwin County Building & Loan Association**, supra, this appellee is attempting to adopt inconsistent attitudes. In the **Aetna Case** the mortgagee had an election as to the securities on which he would rely for payment of the mortgage debt. He could have sued under the insurance policy which was fully matured and recovered his interest in that manner. In this case the mortgage would have been extinguished and the remainder of the real property would have reverted to the mortgagor. Or, as he did, the mortgagee was entitled to rely upon the security of the property to foreclose his mortgage lien, and satisfy his mortgage indebtedness through the foreclosure sale. When

the mortgage indebtedness was discharged in this manner the mortgagee surrendered his rights under the insurance policy, as the Court held. But the mortgagee desired to "have his cake and eat it, too." He desired to enjoy the security of the property and also enforce payment from the insurance company of the proceeds of the policy. As the Court so justly held, he could not have both. He could have only one satisfaction.

The appellee in this case is adopting just such an inconsistent attitude. For the moment let us suppose that the appellee acquired the Jay-Feibelman mortgage without executing the release and subordination agreement given by her to Curb. She would have had a number of securities for her mortgage indebtedness. First, of course, there would have been the primary security of the mortgaged property; from aught that appears this may have been a first mortgage, if the mortgage lien previously enjoyed by D. F. Jacobs had been extinguished (the evidence in the case is silent upon this point). Then there would have been the primary obligation of the Barnes, who assumed the indebtedness on the mortgage. Then there would have been the secondary obligation of W. E. Curb on the mortgage; following which would have been, next in order, the obligation of the insured in the policy, Elmer Russell Wood, and then the personal obligation of the original mortgagor, George H. Jay. In addition, there would have been the security afforded the appellee under this policy of insurance; she would have been entitled to whatever rights Elmer Russell Wood had thereunder. Of course, after the sale by Wood to Curb the barest sort of insurable interest remained in Wood, that is indemnity against his being called upon as surety to pay the mortgage indebtedness. With all the prior security available for the debt, the likelihood that he would be called on would appear remote. However, the amount that Wood could have possibly recovered under the policy on account of his interest is not

of immediate concern. Alabama law is clear to the effect that where only a limited interest is covered by a policy of insurance, recovery cannot exceed the value of the interest insured. **American Ins. Co. v. Porter**, 144 So. 129.

But, whatever her reasons, appellee made her choice as to which of these securities she desired to rely on and to retain. She released W. E. Curb from any liability on the mortgage indebtedness; it follows as a matter of law, as we have seen above, that she thereby also released Elmer Russell Wood and George H. Jay. Since we have already demonstrated in the argument on the first Specification of Error, that appellee's rights in the policy in suit were derived solely from whatever rights Wood might have therein, she has also released these appellants, since her release of Wood extinguished the mortgage indebtedness as to him and destroyed any right of recovery he might have had under this policy. After the release, there was no prospect of his sustaining monetary loss on account of the fire.

Appellee by her actions in executing the release and subordination agreement to W. E. Curb, has irrevocably chosen to rely solely upon the security afforded by the mortgaged property, and on the security afforded by the personal obligation of the only persons liable on the mortgage, the Barnes, the owners of the title to the property in question. This case is but another example, with the case of **Aetna Ins. Co. v. Baldwin County Building & Loan Association**, supra, of a party's attempting to "have her cake and eat it too." The appellee has made her choice, for whatever reasons were good and sufficient to her (and we can well imagine and speculate what those reasons were), and she must be held to be bound thereby. She cannot release Elmer Russell Wood from liability on this mortgage indebtedness at one time, and then later on demand payment from him on such indebtedness. By the same token, she cannot discharge these appellants' obliga-

tion to Elmer Russell Wood under the policy, she cannot abrogate her derivative rights to stand in Elmer Russell Wood's shoes under said policy, as she has done by her extinguishment of the mortgage indebtedness insofar as Wood was concerned and by her eradication of the last vestige of interest which Wood had in the instant policy, and later on attempt to capture the proceeds of this policy as a mere windfall or enforced contribution to her and to those who alone are liable for the mortgage indebtedness at the time suit was instituted, as she is attempting to do in this case.

Just as a matter of interest, even though appellants do not consider it necessary to the decision of this case in their favor, exactly what was the effect of the multi-lateral transactions occurring in March and April of 1955 with respect to the insured property and the mortgage indebtedness thereon? All the parties concerned with the subject matter were completely changed. The owners of the insured property were changed from Curb to the Barnes.

The owner of the Jay-Feibelman mortgage was changed from the Trustees of H. A. Feibelman to the appellee in this case. Those liable on the Jay Feibelman mortgage as debtors were changed completely, all of the previous obligors thereon were discharged by the appellee's execution of the release to W. E. Curb; the only debtors remaining liable thereon were completely new parties to the mortgage, the Barnes. Even some of the incidents of the mortgage indebtedness were changed. It was no longer a prior mortgage on the property but, instead, was subordinated and postponed to the new mortgage indebtedness created in favor of W. E. Curb. Only a mere shell of the old transaction remained, the bare papers evidencing any obligation, the mortgage deed and the note. But should a stranger examine those bare evidences, could he in a million years tell what the actual status was? No, he could not. All of the names appearing on the papers, and

many of the provisions set forth in the papers had "gone with the wind." There had been a novation, the creation of a complete and absolutely new obligation with completely new and different parties thereto. **American National Bank & Trust Co. v. Powell**, 178 So. 21, 235 Ala. 236; **Taylor v. Federal Land Bank of New Orleans**, 191 So. 211, 238 Ala. 366; **Butler v. Walton**, 56 So. 2d 369, cert. denied 56 So. 2d 379.

This new mortgage indebtedness coming into existence as of March 11, 1955, with completely new mortgagor and mortgagee, with different terms and provisions, was not the mortgage indebtedness in existence when the loss payable clause to H. A. Feibelman was added to the policy of insurance sued on. The parties did not have in mind any contract with reference to this completely different obligation at that time. It is a well settled rule of law, that it is only those circumstances which are known to the parties at the time of contracting which they may fairly be said to have had in mind when the contract was made. It is just as true in insurance law as it is in any other branch of contract law, that in interpreting the matters covered by a contract, it is only those things which the parties had in mind at the time of the contract which fall within its provisions. **Home Insurance Co. v. Addler**, 71 Ala. 516; **London Assurance Corporation v. Poole**, 101 So. 831, 212 Ala. 109.

Appellants feel that the basic error committed by the District Court in completely pretermitting their defense that no liability existed to this appellee, inasmuch as the insured in the policy was not entitled to recover thereunder at the time this suit was brought, should dispose of this entire appeal. There is no conflict in the evidence, as the facts were all stipulated. Since the law on the point is clear, appellants earnestly submit to the Court that the judgment should be reversed and one rendered herein in their favor.

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FILED
JAN 13 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 667

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

BRIEF FOR RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

Respondent does wish to state, respectfully, that she is dissatisfied with the presentation by the petitioners of the Questions Presented for Review in this case. Respondent's dissatisfaction arises from the fact that the questions presented for review by petitioners, being five in number, contain, each and every one, the same fault; they assume as true, as a basis for the hypothesis in each case, a fact which is not correct at all. The first question presented assumes as a fact that the insured's limited interest in the property was terminated prior to the institution of the suit. This is not correct at all, and the basic fact being incorrect, this destroys the applicability of the entire first question.

Question Number Two as presented by petitioners assumes as a fact that no monetary loss has been caused the insured and bases the point of the question upon this assumption; actually, it will be seen that the insured has suffered a loss.

Questions Numbered Three, Four and Five all assume as a fact that the Court of Appeals has decided the question contrary to the Law of the State of Alabama, which will also be seen to be incorrect as to fact.

Respondent therefore respectfully points out that petitioners could have presented legitimate questions for review, the questions being as to whether the above-mentioned assumed facts were actually facts or not; since, however, the petitioners have attempted to state the true points of controversy as settled facts and use these controversial points as the bases for artificial questions presented for review, respondent respectfully points out that the petitioners have not properly presented to this Honorable Court a petition for Writ of Certiorari, under the Rules of this Honorable Court.

STATEMENT OF THE CASE.

Respondent wishes to add several very important facts to the statement of the case, none of which were included in the statement of the case made by petitioners.

The respondent in this case has actually paid $4,545.09, in cash money, in the purchase of the rights of Elmer Russell Wood, the insured owner; it will be noted that, in the petition by petitioners, the petitioners stated that the transfer of the mortgage and insurance policy to the respondent by the Co-Trustees of H. A. Feibelman, deceased, was for a "recited consideration of $4,545.09." Respondent points out that, in the agreed stipulation of facts entered into between petitioners and respondent at the time of the trial in the District Court, as shown on page 47 of the record, the full consideration of $4,545.09 had

actually been received from Martha Barnes by the said Co-Trustee. Thus, it will be seen that there was not merely a "recited consideration;" the respondent in this case has actually paid $4,545.09 for the mortgage, and the rights of the insured owner assigned in the insurance policy sued on, in cash, a fact which was stipulated between the parties at the time of the trial.

Demand for payment on the insurance policies from the petitioners has been made by Elmer Russell Wood, W. E. Curb, the Co-Trustees under the will of H. A. Feibelman, and the respondent, and no payment under the policy has been made to any person. These facts were also stipulated between the parties, as shown on page 48 of the record.

The amount due under the note and mortgage which are now held by respondent was, on March 12, 1955, the total sum of $4,545.09, which said fact was stipulated between the parties, as shown on pages 46 and 47 of the record. It will also be noted that this amount is more than $500 in excess of the amount of the damage agreed upon between the parties, namely, $4,000.00, and is several hundred dollars less than the amount of the insurance policy in force, namely, $5,000.00. Premiums on this insurance policy were paid for a full five year term, from October 3, 1949, through the same date of the same month in 1954; that the fire occurred during the fourth year of the five year term of the policy; and no premium has ever been returned by the petitioners to anyone, although more than one year of paid insurance remained at the time of the fire. All these facts are shown on pages 43 and 52 of the record.

Finally, a very important point as to the insurance policy itself should be noted: Unlike the vast majority of fire insurance policies, this particular policy contained absolutely no mention at all of any restriction or provision against transfer of the property by the insured.

ARGUMENT.

In this case, the sole question presented by petitioners for review by this Honorable Court is the question of whether the Court of Appeals has ignored Alabama Law. Since the petitioners have based their argument almost completely upon certain language taken verbatim from one Alabama case, namely, **Aetna Insurance Company v. Baldwin County Building & Loan Association, 163 So. 604**, it seems necessary to examine this one particular Alabama Case with great thoroughness.

In the first place, this particular Alabama case relied on so heavily by petitioners (Aetna Insurance Company v. Baldwin County Building & Loan Association), has a very vital difference from the instant case. In the instant case, as has been so firmly insisted by petitioners from the beginning, the respondent is an appointee under a simple loss payable clause in the insurance policy, having only the right of the insured, Elmer Russell Wood. In the **Aetna** case, supra, the plaintiff was a mortgagee under a New York Standard mortgagee clause. Further, the mortgagee in the **Aetna** case foreclosed the mortgage and purchased the mortgaged property at the foreclosure sale for the full amount of the debt. Now, it is well-settled law both in Alabama and in all other states, that, where a mortgagee purchases the property for the full amount of the mortgage debt, this extinguishes the mortgage debt and also, at the same time, automatically extinguishes the insurable interest of the mortgagee. As stated above, this is not a peculiar Alabama holding; the following quotation from the eminent authority, **Corpus Juris**, shows that this is well settled law: "The foreclosure of the mortgage extinguishes the interest of the mortgagee **as such**, and the same is true when the mortgagee becomes a purchaser at such a sale. But mortgagee so purchasing still has of course an insurable interest as owner." (Emphasis sup-

plied.) **(26 Corpus Juris 31, Sec. 12.)** Thus, it will be seen that the **Aetna** case merely applies a general rule of law in holding that the mortgagee whose only interest was that of a mortgagee and who has purchased the property at foreclosure sale for the full amount of the debt no longer has any insurable interest, as a mortgagee. It is certainly to be assumed that the Court of Appeals was aware of this general rule of law and applied same in this case, or would have applied same, if the facts in this case had shown such law to be applicable.

However, it will be readily seen that the facts of the **Aetna** case, and the law derived therefrom, while perfectly correct in themselves, do not apply to the instant case at all. As stated above, in the instant case the respondent is resting upon the rights of the insured himself, Elmer Russell Wood, under the loss payable clause above mentioned. It is felt that, since petitioners rely completely upon this one Alabama Case, the **Aetna** Case, as their proof that the Court of Appeals erred in failing to apply Alabama Law, it is now necessary to discuss further, and later, Alabama Law. The respondent wishes to point out that this **Aetna** case has been thoroughly discussed in a much later Alabama case, **Milwaukee Mechanics Ins. Co. v. Maples**, 66 So. 2d 159, which completely distinguishes the said **Aetna** case from the instant case. This case, **Milwaukee Mechanics Ins. Co. v. Maples**, was decided by the Court of Appeals of Alabama in 1953; was taken before the Supreme Court of Alabama on June 18, 1953, by Writ of Certiorari, which writ was denied by the Supreme Court of Alabama without any dissenting vote by any of the Justices, and therefore the decision of the **Maples** case is the decision of the Supreme Court of Alabama. In the **Maples** case, the Alabama Court discussed the **Aetna** case as follows:

> "It is the contention of appellant's counsel that to allow appellee to recover the full amount of her loss

after she has received all but $1,000 of the agreed purchase price from the vendee Sears, Roebuck and Company, would in effect allow her to make a profit on the fire, and in effect turn an insurance contract into a wager, a situation contrary to public policy.

Appellant argues that the doctrine of **Aetna Insurance Co. v. Baldwin County Building & Loan Ass'n, 231 Ala. 102, 163 So. 604**, squarely supports this point.

We do not agree. In that case the premiums were paid by the mortgagor, the policy providing, among other things, that the loss was payable to the mortgagee (plaintiff) as her interest may appear. The plaintiff foreclosed the mortgage after the building had burned and purchased the property at the sale for the full amount of the mortgage debt. The mortgagee then sought to recover on the policy. The Supreme Court held that the purchase of the property for the full amount of the debt satisfied the mortgage and the mortgagee was not entitled to recover more.

Under facts of this type the mortgagee's insurable interest is the debt. Such interest diminishes as the debt is paid, and becomes nonexistent when the debt is paid in full.

The policy in the present suit insured Mrs. Maples (appellee) 'to the extent of the actual cash value of the property at the time of the loss * * * against all direct loss by fire'."

The **Maples** case goes on to show that, where the actual insurable interest involved is the interest of the insured owner, and not the interest of a mortgagee under a New York Standard mortgagee clause (thus placing the Maples case on all fours with the instant case) the rule of the **Aetna** case does not apply at all and the transactions between the insured owner, or anyone standing in his stead, and third party, after the loss, and with which transactions the insurance company has no connection and to

which it is not privy, do not affect the rights of the insured owner or those standing under him at all. This is clearly shown from the language of the **Maples** case, as it continues:

> "At the time the policy was written and at the time of the loss, the appellee, as between appellee and appellant, insurance company, was, in law, the owner of the full insurable interest. The appellant's contract was to insure 'to the extent of the actual cash value of the property at the time of the loss'. The fact that the appellee later realized by sale to within $1,000 the amount she has agreed to sell the building for is no defense available to the appellant, who was an entire stranger to the dealings between appellee and the vendee. Appellant's liability must, under the contract, be measured by the fire damage at the time of the loss and not by fortuitous circumstances later befalling the insured and to which appellant was in nowise privy" (Dubin Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393; Heidisch v. Globe & Republic Ins. Co., 368 Pa. 602, 84 A. 2d 566).

In applying the facts and law of the Alabama case of 1953 (the **Maples** case, supra) it will be seen that the Alabama courts, both Court of Appeals and Supreme Court, definitely hold that the insurance company's liability under the contract must be measured by the fire damage at time of the loss and not by later circumstances arising from transactions between the insured owner and third parties, in which transactions the insurance company is not involved. This rule applies directly to the instant case. In the instant case, as petitioners have so strongly insisted from the beginning, the respondent's rights are measured by those of Elmer Russell Wood, the insured owner. Under the rule of the **Maples** case, the insurance company's liability must, under the contract, be measured by the fire dam-

age at the time of the loss (September 22, 1953); nor can this liability of petitioners be measured by any extraneous circumstances later befalling the insured (or the respondent, claiming under the interest of the insured) to which circumstances the insurance company was not privy. Therefore, it will be readily seen, under the Law of Alabama, it need only be determined what was Elmer Russell Wood's insurable interest, and what was the amount of the damage from the fire, at the time of the loss. This fire damage has been stipulated to be $4,000.00. Under the Alabama Law of the Alabama case, the **Maples** case, the later circumstances arising from the transactions involving the respondent and W. E. Curb, in which transactions the insurance company was not remotely concerned, cannot be considered at all in this case.

Respondent wishes, briefly, to summarize other applicable Alabama law which specifically upholds her right to recover in this case. In the first place, as held by the Court of Appeals in this case, the Alabama case, **Union Ins. Soc. of Canton v. Sudduth, 103 So. 845, at page 847,** says as follows: "A policy of fire insurance, after loss is fixed, becomes a contract for payment of money under this statute, and suit must be brought in the name of the beneficial owner—the person entitled to receive the money in his own right. **Capital City Insurance Co. v. Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152; Norwich Union Fire Ins. Co. v. Prude, 145 Ala. 297, 40 So. 322, 8 Ann. Cas. 121.**" The above-mentioned **Capital City Insurance Co. v. Jones** case, an Alabama case, cites, on page 675 of the record of the case in 30 Southern Reporter, a long list of other cases, both Alabama cases and cases from other parts of the United States, which likewise hold that after the loss became fixed, the policy was nothing other than a contract for payment of money. It might be mentioned also that the above-mentioned 1953 Alabama case, the **Maples** case, again states the Alabama law as follows:

"Further, a policy of fire insurance, after loss is fixed, becomes a contract for the payment of money and suit must be brought in the name of the beneficial owner. **Title 7, Section 127, Code of Alabama 1940; Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 So. 674; Union Ins. Soc. of Canton v. Sudduth, 212 Ala. 649, 103 So. 845.**"

It will be seen that the Alabama Law remains the same as shown by the case quoted by the Court of Appeals (**Union Ins. Soc. of Canton v. Sudduth**, supra).

It is felt that the above citations from the rulings of the Alabama Supreme Court, both old and very new, completely negative the complaint of petitioners to the effect that the Court of Appeals in the instant case decided this issue directly contrary to the decisions of the highest court of the State of Alabama However, since petitioners, in pages 25 through 38 of their petition in this case have set out, verbatim, an extract from their brief which was presented before the Court of Appeals, and which extract raises further points, it seems necessary to consider these additional points raised by petitioners. On pages 34 and 35 of the brief and petition of petitioners, they hold that respondent is trying to have her cake and eat it, too. They state that respondent desires to enjoy the security of the property and also enforce payment from the insurance company of the proceeds of the policy, going back to the above-mentioned **Aetna** case and using it to hold that respondent cannot both have her cake and eat it, too. Respondent respectfully points out that she is **not** trying to do both of these things. She has made the election (as petitioners admit on page 34 of their petition that she has the right to do) of proceeding on the insurance policy. It is obvious that, under Alabama Law, after respondent has collected the amount of the fire damage, namely, $4,000.00 plus interest, respondent will be forced to apply this money upon the mortgage debt and satisfy same. Petitioners have

thoroughly proved this point, and respondent agrees with petitioners on this point, to the effect that (after collection of the insurance money from petitioners) respondent will have to satisfy the mortgage and the mortgage debt of record. Nothing in the record in the instant case and nothing in the brief of respondent in the District Court or in the Court of Appeals or in this argument gives a hint that the respondent wishes to both have her cake and eat it, too; she is quite willing and anxious to satisfy the mortgage and the mortgage debt as soon as petitioners pay the amount due under the insurance policy.

It is respectfully pointed out by respondent that, as stipulated between the parties, respondent paid $4,545.09 in cash money for the rights of the insured mortgagor, Elmer Russell Wood; she certainly has a right under Alabama Law, including the Alabama Law pointed out by petitioners, to collect the amount of the fire damage, being the $4,000.00 plus interest, from petitioners in this case. If the argument of petitioners were believed, it would be held to be an evil thing for any appointee of the insured to sell his rights and for the assignee thereof to try to collect on the insurance policy and regain money paid out in a normal business transaction. The Alabama case relied on by petitioners, the **Aetna** case, shows this to be untrue and that respondent does have the right to purchase the rights of Elmer Wood, the insured owner, and recover on the insurance policy (since she is not a mortgagee who has foreclosed the mortgage for the entire debt).

It is true that respondent, in this case, cannot recover, even as the assignee of the rights of Elmer Russell Wood, unless it is shown that Elmer Russell Wood also could recover. On this point it seems necessary to point out that all of the law available on the subject, both that cited by the petitioners and other law, holds that there are only two times when an insurable interest must exist for an insured to be able to recover. The time of the issuance of the

policy, and also at the time of loss. Reference to page 26 of the petitioners' brief, in the quotation from the eminent authority, **Appleman on Insurance**, will show the following:

> "A contract of fire insurance is a personal contract for indemnity for the insurable interest possessed by the insured at the time of the issuance of the policy, and also at the time of loss. The insured's liability is measured thereby."

Except in such an isolated case as that of the **Aetna** case, wherein the mortgagee is suing on the basis of his position as a mortgagee and has extinguished his interest by securing the amount of the mortgage debt in full, there are only two times when an insurable interest must exist: At the time of the issuance of the policy, and also at the time of loss. Since the respondent in this case is claiming under the rights of the insured himself, these are the only two times when an insurable interest must be shown to have eixsted.

Anotner eminent authority, **Corpus Juris Secundum**, gives the same principle of law, citing several cases, including an Alabama case, as authority therefor;

> "To render the contract valid, insured is required by many authorities to have an interest in the property at the time of making the contract as well as at the time of loss, although there are cases which seem to hold that an insurable interest at the time of the loss is sufficient, and it has been said that the requirement of an insurable interest when the risk is assumed arose merely to prevent the use of insurance for illegitimate purposes, and that it should not be extended beyond the reasons for it by excessively technical construction." **(44 Corpus Juris Secundum 875, Section 179)** (citing, among other cases **Girard Fire and Marine Insurance Company v. Gunn, 130 Southern 180, 221 Alabama 654**).

It should be further pointed out that, under Alabama Law, the insured owner, Elmer Russell Wood, had other rights over and beyond his duty and liability as an endorser of the note and mortgage in this case. In the first place, in addition to Elmer Wood's liability as an endorser, he has two very definite rights, arising from this transaction, which he would not wish to relinquish, and each of which would constitute an insurable interest. As a surety on the mortgage, he had a right to redeem the mortgaged property from any foreclosure. This right is shown from the authority, **59 Corpus Juris Secundum 1597, Section 836**: "As a general rule sureties on the mortgage indebtedness, or a part thereof, may redeem from the mortgage" (citing **Alabama** Case **Oden v. Valentine, 127 Southern 219, 220 Alabama 626**). In this 1930 case, the Supreme Court of Alabama held that Robert Oden, an accommodation endorser on his brother's (mortgagor's) note, was entitled to bring a bill for redemption of his brother's land upon foreclosure of the mortgage by Valentine, the mortgagee; thus, under this Alabama Case, since Wood is a surety on a mortgage indebtedness, a fact which has been admitted and insisted upon by petitioners, he still had an equity of redemption at the time of the fire. This equity of redemption is a valuable right which he would not want to relinquish; certainly, the petitioners cannot relinquish this right for Wood by insisting that he has been released by the alleged release of Curb, his principal. In other words, the petitioners cannot take away from Wood his right under these facts by insisting upon the fact that he could be released; he might not want to be released, and this Alabama Case shows that his right to redeem would be a valuable right which would cause him not to wish to be released from his position as surety.

Malone v. Nelson, 167 Southern 714, 232 Alabama 243, is another Alabama case, holding that a child of the mortgagor could redeem by proper bill, during the lifetime of the mortgagor parent, merely because the child was [illegible]en-

tioned in the Alabama Statute **(Title 7, Section 727, Code of Alabama of 1940)** (Infra), and without having to show any interest in the property at all at the time of foreclosure.

Again, the Alabama case, **Tennessee Valley Bank v. Sewell, 107 Southern 834, 214 Alabama 362 (1926)**, upholds the right of a mortgagor, who has conveyed the property to a grantee who has assumed the mortgage, to **insist** upon the right to pay off the mortgage debt and have an assignment of the mortgage to him so that he may then bring a bill for foreclosure; in this Alabama case the mortgagee not only was not trying to collect from this original mortgagor but, on the contrary, insisted upon marking the mortgage paid. However, the mortgagor (who had conveyed the property away completely after making the mortgage) wanted to pay off the mortgage and foreclose, and the Supreme Court of Alabama specifically upheld his right to do so. In the instant case, Elmer Russell Wood is in exactly the same position; after assuming the mortgage himself, he sold to Curb, who assumed the mortgage; as pointed out hereinabove, there are several reasons why Wood might wish to insist upon the right to pay off the mortgage in the instant case, which is obviously in default and has been for years, and have the mortgage subrogated to him so that he may foreclose on same; petitioners cannot give away Wood's right to this privilege granted to him by Alabama Law by saying that the respondent released Curb and thus released Wood. Wood is the only person who could claim this exemption, if the exemption existed at all; if he preferred, he could pay the mortgage debt, instead, and foreclose the mortgage himself, and thus recoup some of the loss he suffered on this property during the time he owned it. He obviously paid $12,500.00 cash for the property, in addition to assuming the $7,500.00 mortgage debt, and sold it for $100.00 plus the mortgage debt. He would very likely value the opportunity to buy the property in at foreclosure, and petitioners cannot take

this right away from Wood by saying that he might have a right to claim that he was released from his liability under the mortgage.

The Alabama case (**Tennessee Valley Bank v. Sewell,** supra) upholds this right as follows: "When the mortgagor, having become a surety, pays off the mortgage, he is entitled to hold it by equitable assignment or subrogation for the purpose of reimbursement from the grantee." The above mentioned Alabama Statute is very pertinent on this point: **Title 7, Section 727, Code of Alabama of 1940. Redemption by Debtor et al.:** "Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity, or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in the manner provided in this chapter."

Since petitioners have constantly claimed that Elmer Russell Wood's interest in the property at the time of the fire was a very small and nominal thing it seems necessary to go into this point. There is an annotation on the entire subject of the extent of recovery by an insured who has only a partial or limited interest in the insured property in **Volume 68** of the **American Law Reports,** beginning at page **1344.** The general rule, as shown in this annotation, is to the effect that the recovery can only be to the extent of the limited interest of the insured. However, this annotation definitely shows that there are two very vital exceptions to this general rule, one of them being the exact facts of the instant case, and this annotation shows that, under these facts, the limited interest is permitted to recover the full value of the insurance, or the full value of the damage,

whichever is less. To quote from **page 1349**, of **68 American Law Reports**:

> "There is a class of cases which allow full recovery for the value of the property destroyed, regardless of the extent of the insured's interest therein . . .
>
> In the same category may be classed cases involving insurance by mortgagors to the full value of the mortgaged property. In such cases, the question arises whether the mortgagor is entitled to recover only the value of his equity of redemption or his equity of redemption plus the mortgage debt, the conclusion invariably being, unlike the case of a mortgagee, that the measure of his recovery is the full value of the property within the limits of the policy. **Carpenter v. Providence Washington Ins. Co.** (1842), **16 Pet. (U. S.) 495, 10 L. Ed. 1044; Nussbaum v. Northern Ins. Co.** (1889); (C. C.) **1 L. R. A. 704, 37 Fed. 524; Borden v. Hingham Mut. F. Ins. Co.** (1836), **18 Pick. (Mass.) 523, 29 Am. Dec. 614; Strong v. Manufacturers' Ins. Co.** (1830) **10 Pick. (Mass.) 40, 20 Am. Dec. 507; J. ks v. Liverpool & L. & G. Ins. Co.** (1910), **206 Mass. 59., 138 Am. St. Rep. 411, 92 N. E. 998.**"

To quote further from the same authority, **68 A. L. R. 1350**:

> "The reason for the above rule as to the mortgagor is, of course, that the mortgage is merely a security for an obligation existing independently of the mortgage, and that the destruction of the mortgaged property does not relieve the mortgagor of such obligation. Hence the strict indemnity theory of an insurance contract is not infringed by allowing full recovery by the mortgagor; although in one case found, **Royal Insurance Co. v. Stinson** (1881) **103 U. S. 25, 26 L. ed. 473**, it is held that the rule applies even though the mortgagor is not personally liable for the debt. This reason becomes all the stronger where the mortgagor

agrees to insure the property for the benefit of the mortgagee."

It will be seen from an examination of the above quotation, and citations, from the American Law Reports Annotation, that the Court of Appeals in the instant case based its rulings on these same cases; reference to pages 20 and 21 of the petitioners' Petition, wherein the opinion of the Court of Appeals in the instant case is set out, will show that the Court of Appeals in this case came to its conclusion as to the value of the insurable interest of Wood at the time of the fire, based upon these same cases, and other authorities. If there were any Alabama cases opposed to this reason, it might be that petitioners would have a right to complain; however, petitioners have not cited any Alabama cases on this point which are in opposition to this holding of the Court of Appeals. In addition to the authorities on this point cited in the above-mentioned annotation from **68 American Law Reports**, and in addition to the authorities cited by the Court of Appeals, as shown on page 21 of the petitioners' Petition, in which the opinion of the Court of Appeals is set out, the respondent wishes also to cite the following authorities:

Joyce on Insurance, Section 1029;
Waring v. Loder, 53 New York 581;
Buck v. Phoenix Insurance Company, 76 Maine 586;
4 Appleman Insurance Law and Practice, Section 2187, Page 67 (wherein is said: "The majority of courts have recognized the mortgagor's right to redeem as an insurable interest of itself. Nor is such insurable interest lost until the period for redemption has expired. And such insurable interest during the redemption period is **for the full value of the property.** (Emphasis supplied.) (Citing many State cases and one United States case.)

One case seems to be, without doubt, the leading case on the subject of the value of the insurable interest of a mort-

gagor who no longer owns the property insured; this is the early (1830) Massachusetts case of **Strong v. Manufacturers' Ins. Co.**, supra. In this case the owner, Strong, gave two successive mortgages to Stebbins, then insured the building for $1,400; later, three judgment creditors against him had the property sold at auction and the mortgagee took over the premises, renting them back to Strong; thereafter fire damages of $1,300 occurred; several months after the fire the equity of redemption was reconveyed to Strong, who had sued on the fire insurance policy for $1,300; in a very widely-quoted opinion, Wilde, J., held:

> "Upon the facts stated we think there can be no doubt that the plaintiff had an insurable interest in the house assured, at the time the policy was effected; for although a policy of insurance is a contract of indemnity, and wager policies are not to be countenanced, yet a legal title to the property insured is not necessary to give validity to such a contract. A mere equitable title or any qualified property in the thing insured may be legally protected by insurance; **Columbian Ins. Co. v. Laurence, 2 Peters (Sup. Ct. Rep.) 25; Marshall on Ins. (1st Ed.) 91**; and it is very clear that the plaintiff not only had an insurable interest, but that his interest was substantially the same as it would have been had the property insured been free from any incumbrance; for he was liable to the mortgagee and the attaching creditor for the whole amount of the debts for which they had obtained liens, and it is well settled that a mortgagor may protect his equitable interest at any time until actual foreclosure of the mortgage. Nor did any of the events subsequent to the insurance wholly divest the plaintiff of his interest for after the sale of the equity still he had a right to redeem, and this right might constitute a valuable interest. No evidence was offered to show that it was not. The presumption is that it was of some value, for the plaintiff did after-

wards actually redeem or purchase the equity; and independently of any circumstance tending to show that a right of redemption is a valuable interest, the law would presume that it was, the contrary not appearing. The plaintiff, too, might, from local attachment and other circumstances, estimate the property higher than others would, and as the value of property is not to be ascertained by the market price, or by the opinion of witnesses, in a case like this, we think the underwriters have not shown any defense on the ground that the plaintiff had no interest at the time of the loss. The value of the plaintiff's interest in the property insured is not material. If he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of the damage to the property, not exceeding the sum insured."

In an Annotation **(20 American Decisions 507)** it is stated:

> "**Strong v. Manufacturers' Ins. Co.** is most extensively referred to in subsequent decisions upon all the points which it decides."

In conclusion, it would seem pertinent to discuss a statement contained in the Argument of Petitioners on page 13 of their Petition: "The effect of the decision would be to deprive petitioners of a fairly substantial amount of money in a case, which if left in the Court of the State of Alabama, would probably have been decided in the petitioners' favor." Petitioners seem to be complaining because, in their opinion, the courts of the United States have deprived them of rights which would have been granted to them by the courts of the State of Alabama. In their statement of the case, on page 9 thereof, petitioners merely stated that the respondent instituted the present suit in the Circuit Court of Marengo County, Alabama, but did not mention the fact that it was the petitioners who,

themselves, removed the case from the State Court to the Federal Court. By reference to pages 12, 13 and 14, of the record it will be seen that the petitioners, by Notice of Removal and by Removal Bond, filed on September 29, 1955, in the Circuit Court of Marengo County, Alabama, themselves are the ones who removed this case from the State Court and placed it in the Courts of the United States of America. Respondent respectfully points out that petitioners have shown no Alabama Law of any sort which has been ignored or overlooked by the Court of Appeals in the instant case but that, on the contrary, the Court of Appeals has applied law which is both general throughout the United States and is specifically upheld by the cases of the Supreme Court of Alabama and thus, respondent humbly prays that this writ will be denied.

Respectfully submitted,

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Certificate of Service.

I, W. W. Dinning, one of the Counsel for Respondent, in this cause, hereby certify that I have mailed a copy of the foregoing Brief for Respondent to Hon. Hugh A. Locke, Counsel for Petitioners, to his office at Frank Nelson Building, Birmingham, Alabama, and a copy to Messrs. Mead and Fitzpatrick, of Counsel for Petitioners, to their office at Frank Nelson Building, Birmingham, Alabama, each by United States Mail, postage prepaid, this 9th day of January, 1958.

W. W. Dinning,
Demopolis, Alabama,
Of Counsel for Respondent.